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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE: *
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* 02-MD-1335-PB
TYCO INTERNATIONAL, LTD. * 10-6-08
* 10:00 A.M.
MULTIDISTRICT SECURITIES *
LITIGATION *
*
* * * * *

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

FOR TYCO: ELIZABETH F. EDWARDS, ESQ.
MARSHALL BEIL, ESQ.
MCGUIRE WOODS

FOR MR. KOZLOWSKI: ROBERT SCHWARTZ, ESQ.
JYOTIN HAMID, ESQ.
WOLF POPPER, LLP

COURT REPORTER: SUSAN M. BATEMAN, CSR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
55 PLEASANT STREET
CONCORD, NH 03301
(603)225-1453

1 P R O C E E D I N G S

2 THE COURT: GOOD MORNING. I HAVE A COURT
3 REPORTER HERE AND MY LAW CLERKS.

4 MR. BEIL: GOOD MORNING, YOUR HONOR.

5 MR. SCHWARTZ: GOOD MORNING, YOUR HONOR.

6 THE COURT: THIS TRO SEEMS TO HAVE BEEN
7 PROMPTED BY A DECISION BY THE NEW YORK DISTRICT
8 ATTORNEY TO HAVE THE TRO ENTERED IN STATE COURT
9 DISSOLVED AND A DECISION BY MR. KOZLOWSKI AND HIS
10 EX-WIFE TO SETTLE THEIR PENDING DIVORCE IN A WAY WHICH
11 LEAVES TYCO INSECURE CONCERNING ITS ABILITY TO RECOVER
12 MONIES IT CLAIMS IT'S OWED BY KOZLOWSKI.

13 BEFORE WE GET INTO THE MERITS OF THIS THING,
14 IS THERE A PRACTICAL SOLUTION TO THIS PROBLEM? CAN WE
15 COOPERATIVELY ADDRESS TYCO'S CONCERNS IN A WAY THAT
16 ALLOWS THE DIVORCE AT LEAST TO BE FINALIZED AND LEAVES
17 US IN A SITUATION WHERE TYCO'S FEARS ARE ADDRESSED BUT
18 THE KOZLOWSKIS ARE ABLE TO END THEIR MARRIAGE AND MOVE
19 ON?

20 MR. SCHWARTZ: YOUR HONOR, THIS IS ROBERT
21 SCHWARTZ. I'M CERTAINLY OPEN TO ANY IDEAS ON THAT
22 SUBJECT, BUT JUST TO -- ALTHOUGH WE'RE NOT COUNSEL OF
23 RECORD FOR MR. KOZLOWSKI IN THE DIVORCE PROCEEDINGS,
24 WE UNDERSTAND AND HAVE BEEN SO ADVISED THAT THERE IS A
25 FINAL JUDGMENT OF DIVORCE IN FLORIDA AND THE

1 KOZLOWSKIS ARE, IN FACT, NOW DIVORCED, AND THERE'S AN
2 ORDER --

3 THE COURT: OKAY. I ASSUME SHE WANTS SOME
4 MONEY, THOUGH, AND IF SHE HASN'T GOTTEN IT ALREADY, I
5 ASSUME SHE DOESN'T -- SHE AND HER HUSBAND WOULD WANT
6 THE PROCEEDS TO BE ABLE TO BE TRANSFERRED, RIGHT?

7 MR. SCHWARTZ: WELL, I'M SURE THAT'S RIGHT.
8 THEY CERTAINLY HAVE A PROPERTY DIVISION THAT'S PART OF
9 THAT JUDGMENT, ALL OF WHICH I AM TOLD IS THE SUBJECT
10 OF A CONFIDENTIALITY ORDER FROM THE FLORIDA COURT,
11 WHICH I BELIEVE IS FAIRLY STANDARD IN DIVORCE
12 PROCEEDINGS IN FLORIDA.

13 THE COURT: YEAH, BUT LET'S BE REALISTIC
14 ABOUT THIS. I HAVE THE POWER TO STOP MR. KOZLOWSKI
15 FROM TRANSFERRING ANY ASSETS HE HAS TO HIS EX-WIFE,
16 AND IF WE NEED TO GET INTO THE QUESTION OF WHETHER I
17 SHOULD EXERCISE THAT POWER OR NOT, I WILL, BUT IT
18 WOULD SEEM TO ME THAT HE AND SHE WOULD WANT ME NOT TO
19 EXERCISE THAT POWER, AND IF THERE'S SOME WAY THAT YOU
20 CAN, THROUGH AGREEMENT, PUT YOURSELF IN A POSITION
21 WHERE YOU AND TYCO ARE SATISFIED, I'M CERTAINLY
22 WILLING TO GIVE SUBSTANTIAL DEFERENCE TO ANY AGREEMENT
23 LIKE THAT.

24 I MEAN IT'S NOT AS IF YOU CAN JUST WALK AWAY
25 HERE. I'VE GOT QUITE A BIT OF POWER TO RESTRAIN MR.

1 KOZLOWSKI, ASSUMING HE HASN'T ALREADY DONE WHATEVER IT
2 IS HE WOULD DO PURSUANT TO THE DIVORCE SETTLEMENT.

3 MR. SCHWARTZ: YOUR HONOR, WE OBVIOUSLY DON'T
4 BELIEVE ANY SUCH RESTRAINTS SHOULD BE IMPOSED, AND IN
5 FACT, WE DO THINK THAT TYCO, IN PARTICULAR, IS ALREADY
6 UNUSUALLY WELL SECURED FOR A PREJUDGMENT CIVIL
7 LITIGANT SEEKING NOTHING BUT MONEY DAMAGES HERE.

8 THEY HAVE ALREADY RECEIVED AND HOLD OVER
9 \$150 MILLION OF RESTITUTION THAT WAS ORDERED BY THE
10 NEW YORK STATE COURTS IN CONNECTION WITH THE CRIMINAL
11 PROCEEDINGS.

12 THE COURT: I DON'T EVEN WANT TO ARGUE THE
13 MERITS YET. IF YOU WANT TO GET INTO THAT, WE WILL,
14 BUT I GUESS YOU'RE BASICALLY SAYING YOU DON'T WANT TO
15 TRY TO WORK SOMETHING OUT.

16 MR. SCHWARTZ: WE'RE OPEN TO THAT, YOUR
17 HONOR, BUT I DON'T QUITE KNOW WHAT IT WOULD BE OTHER
18 THAN RESTRAINING --

19 THE COURT: WELL, LET'S START -- IF I WERE
20 TYCO, I WOULD BE SAYING, LOOK, LET'S REACH AN
21 AGREEMENT WHERE FIRST YOU GET PERMISSION TO MAKE ME
22 FULLY AWARE OF THE TERMS OF THE DIVORCE AGREEMENT.
23 SECOND, YOU AGREE THAT YOU NOT MAKE ANY FURTHER
24 TRANSFERS FROM THIS MOMENT FORWARD PURSUANT TO THE
25 DIVORCE AGREEMENT WITHOUT KNOWLEDGE AND AN OPPORTUNITY

1 FOR US TO COME TO COURT IN FRONT OF JUDGE BARBADORO TO
2 GET A RESTRAINING ORDER, AND WE, IN TURN, WILL AGREE
3 TO ALLOW CERTAIN MONIES THAT WE MIGHT OTHERWISE HAVE A
4 CLAIM AGAINST TO GO TO HER SO THAT SHE COULD GET SOME
5 MONEY RIGHT AWAY, AND WE'LL AGREE TO LEAVE THINGS IN
6 PLACE UNTIL WE -- FOR THE REST OF IT UNTIL WE GET
7 THINGS RESOLVED. IF YOU WANT PRACTICAL, THAT'S
8 PRACTICAL. DO YOU WANT TO DO THAT?

9 MR. SCHWARTZ: YOUR HONOR, I CAN CERTAINLY
10 EXPLORE WITH THE CLIENT, AND I WOULD HAVE TO EXPLORE
11 WITH COUNSEL FOR MRS. KOZLOWSKI.

12 THE COURT: YEAH. I MEAN SOME MONEY IS
13 PROBABLY BETTER THAN NO MONEY, ISN'T IT?

14 MR. SCHWARTZ: WELL, AGAIN, YOUR HONOR, WE
15 THINK THEY ALREADY HAVE SUBSTANTIAL FUNDS SO --

16 THE COURT: I'M NOT IN THE MERITS YET, OKAY?

17 MR. SCHWARTZ: I'M JUST TRYING TO BE
18 PRACTICAL, YOUR HONOR.

19 THE COURT: YEAH, AND WHAT I'M SAYING IS THAT
20 YOU RUN A RISK THAT YOU GET TO THE END OF THIS HEARING
21 AND THERE'S AN ORDER PREVENTING ANY TRANSFER OF ANY
22 MONEY, AND IT WOULD SEEM TO ME THAT IF -- I DON'T KNOW
23 IF TYCO HAS ANY INTEREST IN THIS, EITHER. THAT TYCO
24 WOULD HAVE SOME INTEREST IN DOING THIS IN A WAY THAT
25 ACCOMMODATES -- DOES THE FORMER MRS. KOZLOWSKI STILL

1 USE KOZLOWSKI? I DON'T WANT TO --

2 MR. SCHWARTZ: I DON'T KNOW, YOUR HONOR.

3 THE COURT: WELL, LET'S YOU CALL HER

4 KOZLOWSKI NOW BECAUSE WE DON'T KNOW. THAT MRS.

5 KOZLOWSKI WOULD WANT TO HAVE SOME MONEY FROM THIS

6 THAT'S BEEN TIED UP UP TILL NOW, AND TYCO WOULD HAVE

7 AN INTEREST IN LETTING HER HAVE SOME IF THEY COULD

8 HAVE AN AGREEMENT THAT THE BALANCE OF IT COULD JUST BE

9 HELD IN AN APPROPRIATELY SECURE INTEREST BEARING

10 ACCOUNT UNTIL THIS THING IS RESOLVED. I MEAN THAT

11 JUST SEEMS TO ME TO BE PRACTICAL.

12 LET ME ASK TYCO. DO YOU HAVE ANY INTEREST IN

13 DOING SOMETHING LIKE, OR DO YOU WANT TO JUST PRESS

14 AHEAD AND HOPE THAT I GIVE YOU EVERYTHING YOU ASK FOR?

15 MS. EDWARDS: NO, YOUR HONOR. WE WOULD BE

16 MUCH INTERESTED IN REACHING SOME AGREEMENT LIKE YOU

17 HAVE LAID OUT.

18 THE COURT: WELL, DO YOU WANT SOME TIME TO

19 TALK ABOUT IT? I MEAN I COULD ENTER AN ORDER SAYING

20 I'LL LEAVE THINGS IN PLACE -- I'LL ENTER AN ORDER

21 ENJOINING ANY FURTHER TRANSFERS FOR 24 HOURS IF THE

22 PARTIES ARE WILLING TO TRY TO REACH SOME KIND OF

23 ACCOMMODATION IN THE MEANTIME THAT WOULD RESULT IN A

24 MORE LASTING AGREEMENT CONCERNING THE DISPOSITION OF

25 ASSETS.

1 IF YOU DON'T WANT TO DO THAT, THAT'S FINE
2 WITH ME. WE'LL JUST GO ON, AND I'LL HEAR YOU ON YOUR
3 PROFFERS AND MAKE AN ORDER AND WE'LL GO THE STANDARD
4 TRO ROUTE, AND IF I GIVE A TRO, SET UP A TIME FOR A
5 PRELIMINARY INJUNCTION, ADDRESS THE ISSUE OF
6 DISCOVERY, BUT IT SEEMS LIKE PRACTICALLY MOTIVATED
7 PEOPLE WOULD SEE THE BENEFIT OF TRYING TO WORK
8 SOMETHING OUT.

9 SO IT'S UP TO YOU. IF ANYBODY ISN'T
10 INTERESTED IN THAT KIND OF APPROACH, THAT'S FINE.
11 WE'LL JUST GO RIGHT ON AND DEAL WITH IT IN THE
12 STANDARD WAY.

13 MR. SCHWARTZ: YOUR HONOR, WE'RE CERTAINLY
14 INTERESTED IN THAT. AS YOUR HONOR APPRECIATES, MR.
15 KOZLOWSKI IS INCARCERATED. WE WOULDN'T BE ABLE TO
16 HAVE VERY MUCH OF A DIALOGUE IN THAT SHORT A PERIOD OF
17 TIME.

18 I THINK WE SHOULD GO FORWARD WITHOUT IN ANY
19 WAY ABANDONING TRYING TO FIND A PRACTICAL SOLUTION,
20 BUT I JUST DON'T THINK WE'RE GOING TO BE ABLE TO BE IN
21 A DIFFERENT POSITION 24 HOURS FROM NOW JUST GIVEN THE
22 PRACTICALITIES OF TRYING TO COMMUNICATE WITH OUR
23 CLIENT.

24 THE COURT: OKAY. THAT'S FAIR. I
25 UNDERSTAND. ALL RIGHT. LET ME ASK TYCO. I'VE GOT TO

1 SAY -- MAYBE BECAUSE I'M A CAUTIOUS GUY -- I'M ALWAYS
2 SKEPTICAL WHEN I GET FRIDAY AFTERNOON TROS WITH
3 EMERGENCY, EMERGENCY WHEN ALL OF THIS SEEMS TO HAVE
4 BEEN READILY PREDICTABLE TO TYCO. WHY DID YOU WAIT
5 UNTIL THE ELEVENTH HOUR AND 59TH MINUTE TO COME IN
6 HERE AND TRY TO GET A TRO?

7 MR. BEIL: YOUR HONOR, THIS IS MARSHALL BEIL,
8 ONE OF ELIZABETH EDWARDS'S PARTNERS. I APOLOGIZE THAT
9 IT WAS FRIDAY AFTERNOON. THAT WAS SOME HAPPENSTANCE
10 BY TIMING.

11 WE ARE NOT PARTIES TO THE -- OR TYCO IS NOT A
12 PARTY TO THE NEW YORK CIVIL FORFEITURE. WE FOUND OUT
13 ABOUT THAT --

14 THE COURT: WAIT A MINUTE. THAT'S SHOCKING
15 TO ME. YOU'RE THE VICTIM WHO IS ENTITLED TO
16 \$95 MILLION IN RESTITUTION, AND YOU HAD NO IDEA THAT
17 THE RESTITUTION WAS GOING TO BE PAID TO YOU AND THE
18 INJUNCTION LIFTED?

19 MR. BEIL: NO, YOUR HONOR. THE AGREEMENT AND
20 THE PAPERS THAT WERE BEFORE THE COURT IN NEW YORK WERE
21 THAT TYCO WOULD BE PAID IT'S \$97 MILLION AND THE
22 RESTRAINT WOULD STAY IN PLACE AT LEAST UNTIL AFTER
23 THAT WAS PAID, AND ONCE THAT WAS PAID TYCO WAS NO
24 LONGER A PARTY TO THAT ACTION. SO THE STIPULATION
25 THAT WAS ENTERED INTO IN NEW YORK BETWEEN THE D.A. AND

1 MR. KOZLOWSKI'S COUNSEL DID NOT INVOLVE TYCO. WE
2 FOUND OUT ABOUT THE --

3 THE COURT: DON'T THEY HAVE A VICTIM'S RIGHTS
4 LAW IN NEW YORK?

5 MR. BEIL: NOT IN THIS CONNECTION BECAUSE
6 WE --

7 THE COURT: SO JUST -- \$95 MILLION JUST
8 SHOWED UP IN YOUR BANK ACCOUNTS, AND YOU WERE JUST
9 REALLY SURPRISED BY THAT, HUH?

10 MR. BEIL: WELL, IT SHOWED UP SOME TIME AGO,
11 YOUR HONOR. THERE WERE RESTITUTION ORDERS TO TYCO.
12 THERE WERE ALSO FINES THAT HAD TO BE PAID TO THE
13 STATE, WHICH WERE NOT -- WHICH TYCO WAS NOT A PARTY
14 TO.

15 THE COURT: WELL, WHEN DID YOU GET THE
16 \$95 MILLION?

17 MR. BEIL: I BELIEVE IT WAS --

18 MS. EDWARDS: 2007.

19 MR. BEIL: -- IN 2007, YOUR HONOR.

20 MR. SCHWARTZ: YOUR HONOR, IT WAS IN JANUARY
21 OF 2007.

22 THE COURT: AND WHEN DID THIS TRO GET
23 DISSOLVED IN NEW YORK?

24 MR. BEIL: IT WAS ENTERED BY THE CLERK ON
25 SEPTEMBER 22ND. IT HAD BEEN SIGNED A FEW DAYS EARLIER

1 BY THE JUDGE.

2 THE COURT: AND SO WHY WAS THE TRO IN PLACE
3 IF NEW YORK HAD GOTTEN EVERY DIME THAT IT WAS ENTITLED
4 TO FROM THEM?

5 MR. BEIL: IT'S NOT CLEAR TO ME WHEN NEW YORK
6 WAS PAID THE FINES THAT WERE ALSO IMPOSED ON MR.
7 KOZLOWSKI AND MR. SWARTZ.

8 MR. SCHWARTZ: YOUR HONOR, I DON'T WANT TO
9 INTERRUPT MR. BEIL, BUT I CAN ANSWER THAT QUESTION IF
10 YOUR HONOR WANTS ME TO DO THAT NOW.

11 THE COURT: YES.

12 MR. SCHWARTZ: THE STATE STATUTE THAT THE
13 D.A. PURSUED IN THE CIVIL FORFEITURE PROCEEDING
14 FREEZING MR. KOZLOWSKI'S ASSETS WAS LIFTED AFTER HE
15 PAID IN FULL THE RESTITUTION -- THE \$98 MILLION --
16 WHICH WAS TRANSFERRED TO TYCO IN JANUARY OF '07, AND
17 WHEN THE \$70 MILLION IN A CRIMINAL FINE THAT WAS ALSO
18 IMPOSED AS PART OF THE SENTENCE WAS FULLY ESCROWED --
19 THE LAST PORTION OF THAT \$70 MILLION FINE WAS ESCROWED
20 EARLIER IN SEPTEMBER OF '08, AND THE STATUTE WHICH THE
21 D.A. HAD INVOKED, WHICH IS NOT AVAILABLE FOR
22 PREJUDGMENT CIVIL LITIGANTS, THEY LIFTED THAT
23 FORFEITURE ACTION AND DISMISSED THE FORFEITURE
24 PROCEEDING AS SOON AS THEY HAD SECURED ALL OF THE
25 FINANCIAL COMPONENTS OF THE CRIMINAL SENTENCE, AS THEY

1 HAD DONE A YEAR EARLIER IN THE CASE OF MARK SWARTZ,
2 WHO WAS ABLE TO LIQUIDATE ASSETS AND PAY HIS FULL
3 RESTITUTION AND CRIMINAL FINE I BELIEVE ABOUT A YEAR
4 EARLIER THAN MR. KOZLOWSKI WAS ABLE TO COMPLETE THAT
5 PROCESS.

6 THE COURT: WELL I MEAN IT'S A LITTLE
7 FRUSTRATING. APPARENTLY -- YOU GIVE A LOGICAL
8 EXPLANATION FOR THE SITUATION. SO APPARENTLY TYCO WAS
9 UNDER A MISTAKEN IMPRESSION THAT IT COULD BE
10 SUFFICIENTLY SECURED BY THE TRO ENTERED BY THE -- AT
11 THE REQUEST OF THE DISTRICT ATTORNEY, BUT THE DISTRICT
12 ATTORNEY, I DON'T THINK UNREASONABLY, BELIEVED THAT,
13 LOOK, TYCO WAS TAKEN OUT WHEN IT WAS PAID IN '07, AND
14 WE DIDN'T HAVE TO GIVE IT ANY NOTICE BECAUSE TYCO --
15 THE REMAINING TRO WAS TO BENEFIT US, NOT TO BENEFIT
16 THE VICTIM. THAT'S WHAT YOU'RE SAYING, RIGHT,
17 COUNSEL?

18 MR. BEIL: YES, SIR, AND AS SOON AS WE FOUND
19 OUT THAT THE ORDER HAD BEEN ENTERED, WE PREPARED THESE
20 PAPERS AND CAME TO YOUR HONOR AS QUICKLY AS WE COULD.

21 THE COURT: WELL, NO OFFENSE, BUT YOU SHOULD
22 HAVE DONE THIS MANY, MANY MONTHS AGO BECAUSE YOU HAD
23 NO REASONABLE EXPECTATION THAT YOU COULD CONTINUE TO
24 BE PROTECTED BY THE NEW YORK DISTRICT ATTORNEY'S TRO
25 BECAUSE YOU WERE NO LONGER A BENEFICIARY OF THAT TRO

1 ONCE THE FULL PAYMENT HAD BEEN MADE, AND YOU SHOULD
2 HAVE COME HERE MONTHS AGO BEFORE THINGS WERE IN THIS
3 VERY DIRE SITUATION.

4 IT IS ALSO NO SECRET THAT THE KOZLOWSKIS WERE
5 GETTING DIVORCED. I THINK I READ ABOUT THAT A YEAR OR
6 SO AGO. SO THE SITUATION WE FIND OURSELVES IN SEEMS
7 TO ME TO HAVE BEEN VERY PREDICTABLE TO TYCO.

8 MR. BEIL: THE ANNOUNCEMENT OF A POTENTIAL
9 SETTLEMENT, SUBJECT TO APPROVAL OF THE COURT, WAS ONLY
10 IN JULY OF THIS YEAR, AND THE RESTRAINT WAS STILL IN
11 PLACE AND THERE WAS SOME INDICATION IN THE PRESS, AT
12 LEAST, THAT THE SETTLEMENT AGREEMENT AND THE DIVORCE
13 HAD TO GO THROUGH THE NEW YORK COURT, WHICH I DON'T
14 THINK ACTUALLY DID HAPPEN. THE DIVORCE WAS ONLY
15 GRANTED -- THE FINAL -- IN MID-AUGUST AND THE
16 RESTRAINT WAS STILL IN PLACE AT THAT POINT IN NEW
17 YORK.

18 SO ALL OF THESE THINGS WERE IN PLACE, AND
19 PERHAPS WE SHOULD HAVE MOVED BEFORE ANY OF THESE
20 RESTRAINTS WERE LIFTED, AND I APOLOGIZE FOR NOT HAVING
21 DONE THAT, BUT WE MOVED AS QUICKLY AS WE COULD ONCE WE
22 FOUND OUT THAT THE RESTRAINTS HAD BEEN LIFTED TO ASK
23 YOUR HONOR FOR A RESTRAINT GOING FORWARD.

24 THE COURT: IS THERE ANY REASON TO BELIEVE
25 THAT THESE TRANSFERS HAVEN'T ALREADY OCCURRED, AND

1 THEREFORE, THE ISSUANCE OF A TRO WOULD BE MOOT?

2 MR. BEIL: WE JUST DON'T KNOW, YOUR HONOR.

3 THAT'S ONE OF THE REASONS WE'VE ASKED FOR EXPEDITED
4 DISCOVERY IS WE DON'T KNOW WHAT THE TERMS WERE AND HOW
5 MUCH MONEY HAS BEEN TRANSFERRED, AND WE ALSO DON'T
6 KNOW WHAT MR. KOZLOWSKI'S FURTHER INTENT MAY BE WITH
7 REGARD TO THE REST OF HIS SUBSTANTIAL ASSETS.

8 THE COURT: OKAY.

9 MR. SCHWARTZ: YOUR HONOR, EXCEPT FOR THE
10 CONFIDENTIALITY ORDER FROM THE FLORIDA COURT, I COULD
11 ENLIGHTEN YOUR HONOR. I GUESS I'M PREPARED TO DO THAT
12 EX PARTE IN THE SAME WAY THAT OF THIS WAS A DOCUMENT
13 DISPUTE OVER A PRIVILEGE, WE COULD MAKE A PRESENTATION
14 TO YOU. OTHERWISE, I THINK WE'RE OBLIGED TO GET THE
15 CONSENT OF THE COURT ON NOTICE TO MRS. KOZLOWSKI, BUT
16 I DON'T BELIEVE THE MATTER IS MOOT. THERE ARE REAL
17 PROPERTY THAT -- IN FLORIDA PROTECTED BY THE FLORIDA
18 HOMESTEAD ACT THAT WILL BE AFFECTED BY THE DIVORCE
19 PROCEEDINGS -- THE DIVORCE JUDGMENT. THAT HAS NOT
20 TAKEN PLACE.

21 THERE IS, I'M TOLD, SOME BACK PROPERTY TAXES
22 THAT ARE DUE TO THE TAXING AUTHORITIES IN FLORIDA, AND
23 THAT'S THE TYPE OF EXPENSE THAT IS LIKELY TO BE PAID
24 IN THE VERY NEAR TERM AS A RESULT OF THE DIVORCE,
25 WHICH OBVIOUSLY FREED UP CERTAIN ASSETS THAT WERE

1 BEING CONTESTED BETWEEN MR. AND MRS. KOZLOWSKI.

2 SO ALTHOUGH I CAN'T SPEAK TO WHAT TRANSFERS
3 HAVE ALREADY TAKEN PLACE OR TO THE SUBSTANTIVE TERMS
4 OF THE DIVORCE SETTLEMENT BECAUSE OF THAT
5 CONFIDENTIALITY ORDER, I THINK I'M AT LIBERTY TO TELL
6 YOUR HONOR THAT THE WHOLE THING IS NOT MOOT IN THE WAY
7 YOUR HONOR RAISES IT.

8 THE COURT: OKAY. I APPRECIATE THAT. ALL
9 RIGHT. WELL, TYCO HAS FILED A MEMORANDUM AND
10 AFFIDAVITS PROVIDING REASONABLY DETAILED SUPPORT FOR
11 ITS POSITIONS REGARDING THE IRREPARABILITY OF THE
12 HARM, THE LIKELIHOOD OF SUCCESS ON THE MERITS AND THE
13 OTHER REQUIREMENTS THAT MUST BE PRESENT FOR THE
14 ISSUANCE OF A TEMPORARY RESTRAINING ORDER.

15 DOES TYCO WANT TO SAY ANYTHING IN ADDITION TO
16 WHAT'S IN ITS PAPERS, OR SHOULD I TURN TO MR.
17 KOZLOWSKI'S COUNSEL AND THEN GIVE TYCO AN OPPORTUNITY
18 TO RESPOND?

19 MR. BEIL: UNLESS YOU HAVE ANY QUESTIONS,
20 YOUR HONOR, AT THIS POINT WE'LL REST ON OUR PAPERS.

21 THE COURT: ALL RIGHT. I'LL HEAR FROM MR.
22 KOZLOWSKI'S COUNSEL.

23 MR. SCHWARTZ: THANK YOU, YOUR HONOR. THIS
24 IS MR. SCHWARTZ AGAIN. OBVIOUSLY WE DON'T BELIEVE
25 THAT TYCO IS ENTITLED TO ANY PRELIMINARY RELIEF AT

1 THIS TIME, RESTRAINING HIS COMPLIANCE WITH THE FLORIDA
2 COURT'S JUDGMENT OF DIVORCE OR OTHERWISE FREEZING HIS
3 ASSETS OR SECURING ANY DISCOVERY AT THIS TIME WITH
4 REGARDS TO HIS ASSETS OR FINANCIAL INFORMATION.

5 TYCO IS NOTHING MORE THAN A PREJUDGMENT CIVIL
6 LITIGANT BEFORE YOUR HONOR ALLEGING A SERIES OF CLAIMS
7 THAT SEEKS NOTHING OTHER THAN MONEY DAMAGES. THE LAW
8 IS WELL SETTLED THAT CLAIMS FOR MONEY DAMAGES, EVEN
9 WHEN THEY'RE INVOKING EQUITABLE -- DOES NOT CONSTITUTE
10 IRREPARABLE HARM, AND THE POSSIBILITY THAT AT SOME
11 FUTURE DATE IF A JUDGMENT IS EVER SECURED THAT THE
12 DEFENDANT MIGHT NOT BE ABLE TO PAY THOSE OBLIGATIONS
13 UNDER THE JUDGMENT HAS NEVER BEEN DEEMED TO BE
14 SUFFICIENT TO CONSTITUTE IRREPARABLE HARM IN AND OF
15 ITSELF.

16 THE COURT: WELL, THAT'S WHERE YOU'VE LOST ME
17 ON THIS. MY UNDERSTANDING OF THE LAW SUGGESTS TO ME
18 THAT WHEN THERE IS EVIDENCE THAT ASSETS THAT WOULD BE
19 NEEDED TO SATISFY A JUDGMENT, AND PARTICULARLY WHEN
20 THERE ARE CLAIMS FOR IMPOSITION OF A CONSTRUCTIVE
21 TRUST, EVIDENCE THAT ONE OF THE LITIGANTS IN
22 ATTEMPTING TO THWART THE POWER OF THE COURT TO AFFECT
23 THE JUDGMENT IS EMINENTLY ENGAGED IN A TRANSFER OF
24 ASSETS TO A THIRD PARTY IS PRECISELY THE KIND OF
25 SITUATION WHERE IRREPARABLE HARM CAN BE FOUND SO I

1 GUESS WE HAVE A RADICALLY DIFFERENT UNDERSTANDING OF
2 THE LAW IN THIS AREA. WHY DON'T YOU EXPLAIN TO ME
3 WHERE I'VE GOTTEN OFF TRACK.

4 MR. SCHWARTZ: YOUR HONOR, I THINK THE PLACE
5 I WOULD START IS WITH THE SUPREME COURT DECISION IN
6 GRUPO MEXICANO VERSUS ALLIANCE BOND FUND, WHICH IS
7 527 U.S. 308, A 1999 DECISION. THERE THE SUPREME
8 COURT VACATED A FREEZE ORDER VERY SIMILAR TO THE ONE
9 THAT TYCO SEEKS HERE.

10 THE SUPREME COURT SAID THAT DISTRICT COURTS
11 DO NOT HAVE AUTHORITY TO PRELIMINARILY ENJOIN OR
12 FREEZE A DEFENDANT'S ASSETS PENDING THE ADJUDICATION
13 OF THE PLAINTIFF'S CLAIM FOR MONEY DAMAGES, REFERRED
14 TO SUCH RESTRAINTS -- PREJUDGMENT RESTRAINTS IN CIVIL
15 CASES AS EFFECTIVELY A LEGAL NUCLEAR WEAPON WHICH THE
16 COURT SITTING IN EQUITY HAS HISTORICALLY --

17 THE COURT: WAS THERE EVIDENCE IN THAT CASE
18 THAT THERE WAS AN EMINENT FRAUDULENT TRANSFER THAT WAS
19 BEING PLANNED?

20 MR. SCHWARTZ: NO, YOUR HONOR. I DON'T
21 BELIEVE THERE WAS.

22 THE COURT: DOES THAT MAKE A DIFFERENCE, IN
23 YOUR VIEW?

24 MR. SCHWARTZ: IT DOES NOT BECAUSE IN THIS
25 CASE THERE'S NO EVIDENCE --

1 THE COURT: WELL, STRIKE THAT. I MEAN I
2 UNDERSTAND YOUR POINT THAT THERE'S NO EVIDENCE, BUT
3 I'M SAYING, ASSUMING THAT THERE IS EVIDENCE THAT THERE
4 IS A FRAUDULENT TRANSFER BEING ANTICIPATED, YOU'RE
5 SAYING THAT STILL THE COURT HAS TO SIT BACK AND ALLOW
6 THE FRAUDULENT TRANSFER TO OCCUR. IT HAS NO AUTHORITY
7 TO PREVENT THE FRAUDULENT TRANSFER OF ASSETS THAT WILL
8 BE USED TO SATISFY AN EQUITABLE JUDGMENT THAT THE
9 COURT IS BEING ASKED TO ENTER?

10 MR. SCHWARTZ: THERE ARE RARE CASES, YOUR
11 HONOR, WHERE THE CIVIL CLAIMANTS HAD A LIEN OR A
12 SECURITY INTEREST IN A PARTICULAR ASSET WHICH THE
13 DEFENDANT WAS IN THE PROCESS OF DISPOSING OF WHERE THE
14 COURTS HAVE REACHED -- PROVIDED PRELIMINARY RELIEF,
15 BUT NOT IN A CLAIM, SUCH AS WE HAVE HERE, FOR MONEY
16 DAMAGES WHERE THERE'S NO PARTICULAR ASSET THAT TYCO IS
17 SAYING MR. KOZLOWSKI HAS A WORK OF ART OR AN APARTMENT
18 THAT HE'S ABOUT TO LIQUIDATE OR RESTRAIN.

19 THE COURT: WELL, OF COURSE IF WE'RE TALKING
20 ABOUT SPECIFIC PROPERTIES, HE WOULD SIMPLY GET AN
21 ATTACHMENT ON THOSE PROPERTIES WHICH COURTS ROUTINELY
22 GIVE ON AN EX PARTE BASIS TO SECURE THE ABILITY TO PAY
23 A JUDGMENT, RIGHT?

24 MR. SCHWARTZ: THAT'S RIGHT, YOUR HONOR, OR
25 ANOTHER SECURITY INTEREST THAT COULD BE ENFORCEABLE.

1 THE COURT: IF THEY KNEW WHERE HIS BANK
2 ACCOUNTS WERE, THEY COULD GET AN ATTACHMENT VERY, VERY
3 EASILY AND ROUTINELY. THAT HAPPENS EVERY DAY IN
4 COURTS ACROSS THE UNITED STATES.

5 MR. SCHWARTZ: WHERE THEY HAVE A CONTRACTUAL
6 SECURITY INTEREST, YOUR HONOR, BUT NOT WHERE --

7 THE COURT: MAYBE NEW HAMPSHIRE IS UNIQUE IN
8 THE WORLD, BUT IF I SUE YOU FOR \$10 MILLION AND I CAN
9 GET AN ATTACHMENT TO SAY THAT YOU'RE ABOUT TO WASTE
10 YOUR ASSETS, I COULD GET AN ATTACHMENT OF YOUR BANK
11 ACCOUNT VERY EASILY.

12 MR. SCHWARTZ: PERHAPS IN NEW HAMPSHIRE, YOUR
13 HONOR, BUT I'M NOT FAMILIAR WITH ANY SUCH PROPOSITION,
14 ABSENT A SECURITY INTEREST. IF THERE WAS A LIEN OR A
15 SECURITY INTEREST THAT TYCO HAD AS A RESULT OF SOME
16 CONTRACTUAL RELATIONSHIP, YES, BUT THEY HAVE NO SUCH
17 CLAIM HERE. THEY'RE JUST SUING FOR MONEY DAMAGES THAT
18 THEY ALLEGE --

19 THE COURT: WELL, THEY'RE NOT SUING FOR MONEY
20 DAMAGES ONLY. THEY'RE SUING FOR IMPOSITION OF A
21 CONSTRUCTIVE TRUST. THAT'S AN EQUITABLE REMEDY, ISN'T
22 IT? THAT'S NOT A REMEDY FOR MONEY DAMAGES, IS IT?

23 MR. SCHWARTZ: NOT A SECURITY INTEREST, YOUR
24 HONOR.

25 THE COURT: WELL, IT'S NOT A MONEY DAMAGES

1 CLAIM. CONSTRUCTIVE TRUST IS AN EQUITABLE REMEDY,
2 ISN'T IT?

3 MR. SCHWARTZ: IT IS AN EQUITABLE REMEDY,
4 YOUR HONOR.

5 THE COURT: SO WHEN THAT REMEDY IS ENFORCED,
6 IT'S NOT A MONEY DAMAGES ORDER.

7 MR. SCHWARTZ: IT'S REDUNDANT WITH THE CLAIM
8 FOR MONEY DAMAGES HERE.

9 THE COURT: THAT THEY MAY ALSO HAVE A CLAIM
10 FOR MONEY DAMAGES DOESN'T MEAN THAT THEY DON'T HAVE A
11 CLAIM FOR EQUITABLE RELIEF. I MEAN THAT'S A LITTLE
12 BIT MISLEADING, COUNSEL.

13 MR. SCHWARTZ: I DON'T BELIEVE I'M
14 MISLEADING, YOUR HONOR. I'M TRYING TO BE AS CLEAR AS
15 I CAN.

16 THE COURT: OKAY. LET ME READ THE CASE
17 YOU'VE CITED.

18 MR. SCHWARTZ: ALL RIGHT.

19 THE COURT: JUST WAIT A MINUTE.

20 (COURT REVIEWS CASE)

21 THE COURT: COUNSEL, LET ME ASK YOU A COUPLE
22 OF QUESTIONS. IF YOU STEAL MY TRACTOR AND I KNOW
23 YOU'RE ABOUT TO SELL IT TO SOMEBODY ELSE, CAN I GET A
24 TEMPORARY RESTRAINING ORDER ENJOINING YOU FROM SELLING
25 THAT TRACTOR TO SOMEBODY ELSE?

1 MR. BEIL: YOUR HONOR, MARSHALL BEIL. THE
2 ANSWER IS YES.

3 THE COURT: I'M ASKING KOZLOWSKI'S COUNSEL.

4 MR. BEIL: ALL RIGHT, YOUR HONOR.

5 MR. SCHWARTZ: YOUR HONOR, THERE ARE SOME
6 CASES WHERE THERE'S A SPECIFIC PIECE OF PROPERTY, LIKE
7 A TRACTOR, WHERE THERE HAS BEEN SUCH RELIEF. I THINK
8 THERE ARE OTHER CASES THAT HAVE GONE THE OTHER WAY.

9 THE COURT: YOU MEAN THE COURT HAS TO STAND
10 BY AND LET A THIEF SELL HIS STOLEN GOODS BECAUSE YOU
11 HAVE TO GET A JUDGMENT AGAINST HIM FIRST AND LEVY ON
12 THE ASSET TO GET RETURN OF THE PROPERTY? THAT'S YOUR
13 THEORY OF THE WAY THE LAW WORKS?

14 MR. SCHWARTZ: WELL, YOUR HONOR, IN THIS CASE
15 I DON'T NEED TO REACH THAT POINT.

16 THE COURT: DON'T REFLECT, PLEASE. I'M
17 ASKING YOU HYPOTHETICAL QUESTIONS. OBVIOUSLY THAT
18 CASE IS NOT THIS ONE. I UNDERSTAND THAT. PLEASE
19 ANSWER MY HYPOTHETICAL QUESTION.

20 MR. SCHWARTZ: I'LL ANSWER YOUR HYPOTHETICAL,
21 YOUR HONOR. IF ALL A PLAINTIFF DOES IS COME INTO
22 COURT AND ALLEGE THAT HE'S BEEN DEFRAUDED OR WAS A
23 VICTIM OF A THEFT --

24 THE COURT: MY NEIGHBOR HAS STOLEN MY
25 TRACTOR. HE NOW IS OFFERING IT FOR SALE ON EBAY.

1 PLEASE GIVE ME AN INJUNCTION. I'VE GOT AN ACTION FOR
2 A CONVERSION AGAINST HIM. I'VE GOT AN EQUITABLE
3 ACTION FOR THE RETURN OF MY PROPERTY. I WANT A TRO TO
4 PREVENT HIM FROM SELLING MY TRACTOR. CAN I DO THAT?

5 MR. SCHWARTZ: THERE ARE CASES THAT WOULD
6 PERMIT THAT, AND THERE ARE CASES THAT SAY NO.

7 THE COURT: WHY WOULD THEY SAY NO?

8 MR. SCHWARTZ: IT'S LIKELIHOOD OF SUCCESS,
9 YOUR HONOR.

10 THE COURT: WELL, LIKELIHOOD OF SUCCESS --
11 ULTIMATELY, YOU CAN'T GET THE TRACTOR BACK? YOU'RE
12 SAYING THAT THE LAW DOES NOT ALLOW A PERSON WHO HAS
13 BEEN A VICTIM OF A THEFT TO GET HIS PROPERTY BACK?

14 MR. SCHWARTZ: IT DEPENDS -- PRELIMINARILY
15 BEFORE A JUDGMENT?

16 THE COURT: NO. YOU SAID LIKELIHOOD OF
17 SUCCESS. SO I'M SAYING, OKAY, WHAT YOU'RE SAYING IS
18 THAT IF HE CAN'T ESTABLISH LIKELIHOOD OF SUCCESS IN
19 GETTING IT BACK EVEN AT THE END OF THE CASE, THE COURT
20 LACKS THE POWER TO ORDER THE RETURN OF THE TRACTOR.

21 MR. SCHWARTZ: IF THE COURT FOUND THERE WAS A
22 HIGH LIKELIHOOD OF SUCCESS AND THAT IT WOULD CAUSE
23 IRREPARABLE HARM TO THE PLAINTIFF TO LOSE THE TRACTOR,
24 YES, THERE ARE CASES THAT WOULD GRANT A PRELIMINARY
25 INJUNCTION IN THOSE CIRCUMSTANCES.

1 THE COURT: AND IF SOMEBODY TOOK MY SATCHEL
2 OF \$100,000 AND RAN IT IN AND DEPOSITED IN HIS BANK
3 ACCOUNT, I COULDN'T GET AN INJUNCTION -- A RESTRAINING
4 ORDER PREVENTING HIM FROM TRANSFERRING THAT MONEY TO
5 ANOTHER PLACE WHILE I TRY TO GET IT BACK?

6 MR. SCHWARTZ: YEAH. THE LAW IS VERY CLEAR,
7 YOUR HONOR, WITH REGARD TO CLAIMS FOR MONEY DAMAGES
8 ALONE --

9 THE COURT: STOP TALKING MONEY DAMAGES, OKAY?
10 I'M NOT ASKING ABOUT MONEY DAMAGES. I'M ASKING ABOUT
11 EQUITABLE REMEDIES. YOU KNOW THERE'S A DIFFERENCE
12 BETWEEN MONEY DAMAGE CLAIMS AND EQUITABLE RELIEF,
13 RIGHT?

14 MR. SCHWARTZ: YES, YOUR HONOR.

15 THE COURT: YOU KNOW THE LAW RECOGNIZES THAT
16 DISTINCTION SO STOP TALKING MONEY DAMAGES. EVERYTHING
17 I'M ASKING YOU IS ABOUT EQUITABLE RELIEF.

18 MR. SCHWARTZ: ALL RIGHT, YOUR HONOR. IF THE
19 EQUITABLE RELIEF IS SIMPLY TO RESTRAIN THE DEFENDANT'S
20 DISPOSITION OF CASH HE HAS THAT THE PLAINTIFF SAYS IS
21 HIS, THE CASE LAW IS PRETTY CLEAR THAT THAT IS NOT
22 RECOVERABLE ON A PRELIMINARY BASIS.

23 THE COURT: YOU AGREE THAT GRUPO MEXICANO IS
24 NOT THAT CASE, RIGHT?

25 MR. SCHWARTZ: GRUPO MEXICANO SUPPORTS THAT

1 PROPOSITION. IT'S NOT THE CASE YOU'VE JUST SET FORTH,
2 YOUR HONOR.

3 THE COURT: IT'S NOT A CASE IN WHICH THE
4 PARTY WAS SEEKING THE RECOVERY OF PROPERTY OR THE
5 IMPOSITION OF A CONSTRUCTIVE TRUST OR A RECISION.

6 MR. SCHWARTZ: IT WAS SEEKING EQUITABLE
7 RELIEF, YOUR HONOR. I DON'T THINK THEY INVOKED THE
8 WORDS CONSTRUCTIVE TRUST, BUT THEY CERTAINLY WERE
9 SEEKING EQUITABLE RELIEF TO PROTECT THEIR --

10 THE COURT: BECAUSE THEY SAID THEY WERE OWED
11 MONEY AND THEY WERE LIKE ANY OTHER PERSON WHO HAD A
12 CLAIM THAT HAD NOT YET BEEN REDUCED TO JUDGMENT. THAT
13 WAS WHAT THAT CASE WAS ABOUT. GIVE ME A CASE WHERE
14 SOMEBODY IS BASICALLY TRYING TO GET THEIR PROPERTY
15 BACK AND THE COURT -- IN AN ACTION FOR EQUITY AND THE
16 COURT HAS -- WHICH ULTIMATELY THE RELIEF REQUESTED IS
17 A PERMANENT INJUNCTION SAYING, GIVE HIM HIS MONEY
18 BACK -- SHOW ME A CASE WHERE THE COURT IS BEING ASKED
19 TO DO THAT AND HAS THE AUTHORITY TO DO THAT,
20 ULTIMATELY CAN'T DO IT PRELIMINARILY OR ON A TRO
21 BASIS.

22 MR. SCHWARTZ: I CAN'T AS I SIT HERE NOW, BUT
23 I BELIEVE THERE ARE QUITE A FEW CASES, YOUR HONOR,
24 WHERE PLAINTIFFS ALLEGING THAT THEY'VE HAD MONEY
25 STOLEN FROM THEM AND ARE SEEKING TO RECOVER THAT MONEY

1 HAVE BEEN DENIED PRELIMINARY INJUNCTIVE RELIEF.

2 THE COURT: I'M CERTAIN THERE ARE CASES WHERE
3 DENIAL IS FOR A VARIETY OF REASONS, LIKE YOU CAN'T
4 PROVE IT, BUT DENIED ON THE GROUNDS -- GIVE ME A CASE
5 WHICH SAYS THAT YOU DO NOT -- THE COURT DOES NOT HAVE
6 THE POWER TO PREVENT SOMEONE WHO STOLE YOUR MONEY FROM
7 TRANSFERRING IT AND GIVING IT TO SOMEONE ELSE UNTIL
8 THE CASE IS -- UNTIL FINAL JUDGMENT IS ENTERED BECAUSE
9 THAT'S THE PROPOSITION THAT YOU'RE REALLY ARGUING
10 HERE, AND I JUST WANT A CASE THAT SUPPORTS THAT
11 PROPOSITION.

12 MR. SCHWARTZ: YOUR HONOR, AS I SIT HERE NOW,
13 I CAN'T CITE YOU A CASE. OF COURSE THAT'S NOT OUR
14 SITUATION SINCE, AS TYCO ACKNOWLEDGES, THEY'VE ALREADY
15 RECEIVED FULL RESTITUTION FOR ALL THE FUNDS THAT THEY
16 ALLEGE WERE --

17 THE COURT: OH, OKAY. I MISREAD THEIR BRIEF.
18 TYCO, YOU AGREE THAT YOU'VE RECEIVED FULL RESTITUTION
19 FOR ALL MONIES THAT KOZLOWSKI WRONGLY TOOK?

20 MR. BEIL: MOST DEFINITELY NOT, YOUR HONOR.

21 THE COURT: YEAH, I DIDN'T THINK SO.

22 MR. BEIL: AND I COULD CITE YOU SEVERAL CASES
23 THAT RULE AGAINST WHAT MR. SCHWARTZ HAS BEEN ARGUING.

24 THE COURT: WELL, GIVE ME A CASE THAT
25 SUPPORTS THE PROPOSITION THAT WHERE A LITIGANT IS

1 SEEKING EQUITABLE RELIEF IN THE FORM OF THE IMPOSITION
2 OF A CONSTRUCTIVE TRUST TO PREVENT THE DISSIPATION OF
3 THE PLAINTIFF'S ASSETS THAT WERE WRONGFULLY ACQUIRED
4 BY THE DEFENDANT -- THAT IN THAT CASE TO FURTHER THAT
5 REMEDY THE COURT HAS THE POWER TO ENTER TEMPORARY OR
6 PRELIMINARY RELIEF PREVENTING THE ASSET FROM BEING
7 DISSIPATED. I THINK THAT'S REALLY WHAT YOU SAY THIS
8 CASE IS ABOUT, ISN'T IT?

9 MR. BEIL: YES, YOUR HONOR.

10 THE COURT: DO YOU HAVE A CASE THAT SUPPORTS
11 THAT SPECIFIC PROPOSITION?

12 MR. BEIL: YES, YOUR HONOR. THERE ARE AT
13 LEAST TWO, AND THEY'RE CITED IN OUR BRIEF. THE FIRST
14 CASE IS U.S. EX REL. RAHMAN VERSUS ONCOLOGY. IT'S A
15 FOURTH CIRCUIT CASE IN WHICH THE FOURTH CIRCUIT LOOKED
16 AT GRUPO MEXICANO AND ALSO LOOKED AT AN EARLIER
17 SUPREME COURT CASE CALLED DECKERT VERSUS INTERNATIONAL
18 UNDER THE SECURITIES LAWS AND HELD -- VERY CLEARLY
19 HELD THAT GRUPO MEXICANO APPLIES ONLY IN A TRADITIONAL
20 CASE FOR MONEY DAMAGES ONLY, AND THAT WHEN A
21 COMPLAINANT ASKS FOR EQUITABLE RELIEF, MAY ALSO ASK
22 FOR MONEY DAMAGES, THAT THE TRADITIONAL RULES OF
23 EQUITY APPLY.

24 THE COURT: WHAT'S THE CITE?

25 MR. BEIL: THE CITE IS 198 F.3D 489, AND THIS

1 ANALYSIS STARTS AT 494, AND THE HOLDING IS AT 496, AND
2 THERE'S A FOLLOW-UP CASE FROM THE DISTRICT OF
3 MASSACHUSETTS THAT CITES RAHMAN AND RELIES ON IT.

4 THE COURT: OKAY. LET'S START WITH RAHMAN.
5 I'LL GET A COPY OF IT AND READ THAT.

6 MR. SCHWARTZ: YOUR HONOR, I THINK BOTH OF
7 THOSE CASES ARE INSTANCES WHERE THERE WAS SPECIFIC
8 PROPERTY ALLEGED, A MACHINERY CASE, FOR EXAMPLE.

9 THE COURT: NOT CASH?

10 MR. SCHWARTZ: CERTAINLY THE MASSACHUSETTS
11 CASE, FAIRVIEW MACHINERY, I BELIEVE THAT WAS THE SALE
12 OF MACHINERY IN WHICH THE PLAINTIFF ALLEGED HAD
13 BEEN -- WAS HIS OR THAT HE HAD AN EQUITY INTEREST IN.

14 MR. BEIL: THE FOURTH CIRCUIT CASE WAS NOT.
15 IT WAS A FRAUD CASE IN WHICH THEY WERE SEEKING TO
16 RESTRAIN THE MONIES THAT HAD BEEN FRAUDULENTLY TAKEN
17 AND THE PROCEEDS. IT WAS A CLASSIC CASE VERY SIMILAR
18 TO THE KINDS OF ISSUES RAISED HERE ON CONSTRUCTIVE
19 TRUST.

20 THE COURT: SEE, I'VE GOT TO TELL YOU, I'M
21 OPEN TO BEING PERSUADED THAT MY UNDERSTANDING OF THE
22 LAW IS INCORRECT HERE, BUT I HAVE ON MANY OCCASIONS
23 AUTHORIZED ATTACHMENTS OF PROPERTY THAT WAS
24 FRAUDULENTLY TRANSFERRED TO PREVENT ITS FURTHER
25 TRANSFER, AND EVEN WHEN THE PROPERTY HAS CHANGED

1 FORM -- IN OTHER WORDS, IT'S GONE FROM, HE STOLE MY
2 CASH TO HE PUT THE CASH INTO A HOUSE AND HE'S NOW
3 GOING TO SELL THAT HOUSE TO HIS WIFE, AND IF IT GOES
4 TO HIS WIFE, MY FRAUDULENT TRANSFER ACTION IS GOING TO
5 BE DEFEATED. I MAY BE MISTAKEN IN THAT. NO ONE HAS
6 EVER PRESENTED THAT ARGUMENT IN THAT CONTEXT TO ME. I
7 CERTAINLY ACCEPT THE VIEW THAT A CLASSIC ACTION FOR
8 MONEY DAMAGES IN WHICH SOMEBODY IS SIMPLY A
9 PREJUDGMENT CREDITOR, THAT YOU CAN'T ORDINARILY GET AN
10 INJUNCTION ENJOINING THE PERSON FROM DISSIPATING
11 ASSETS, BUT BOY, IT'S HARD TO SEE HOW A COURT CAN'T
12 JUST BE LAUGHED AT WHEN FRAUDULENT TRANSFER ACTIONS
13 ARE BROUGHT IF THE COURT CAN'T ACT TO PREVENT THE
14 DEFENDANT FROM DISSIPATING THE ASSETS. IT'S KIND OF A
15 STRANGE CIRCUMSTANCE THERE.

16 MR. BEIL: WHAT THE FOURTH CIRCUIT HELD IN
17 ITS DECISION -- IT TALKS ABOUT AN INJUNCTION TO PUT A
18 CONSTRUCTIVE TRUST ON MONIES OBTAINED BY FRAUD AND
19 ASSETS PURCHASED WITH THE PROCEEDS OF THE FRAUD.
20 CONSTRUCTIVE TRUST REMAINS A REMEDY EVEN THOUGH IT MAY
21 ULTIMATELY REACH A FUND OF MONEY AND IT IMPOSED THE
22 INJUNCTION ON THIS COMPANY'S ASSETS EITHER DIRECTLY OR
23 INDIRECTLY AS A RESULT OF THE FRAUD.

24 WHAT THE RAHMAN CASE SAYS, AND WHAT JUDGE
25 PONSOR SAYS IN FAIRVIEW AND OTHER CASES, IS THAT THE

1 TRADITIONAL EQUITABLE REMEDIES THAT A COURT HAD BEFORE
2 GRUPO MEXICANO REMAINED IN PLACE AFTER GRUPO MEXICANO,
3 AND THAT THAT CASE INVOLVED ONLY A CASE FOR MONEY
4 DAMAGES ONLY WHERE NO ONE WAS SEEKING EQUITABLE RELIEF
5 SO THAT THE FULL PANOPLY OF REMEDIES, YOUR HONOR, HAS
6 ALWAYS REMAINED IN PLACE.

7 THE COURT: WELL, I THINK IN GRUPO -- I AGREE
8 WITH KOZLOWSKI'S COUNSEL. I DO THINK THAT THEY WERE
9 SEEKING A FORM OF EQUITABLE RELIEF, BUT THAT WASN'T
10 WHAT THEY WERE ULTIMATELY SEEKING. WHAT THEY WERE
11 ULTIMATELY SEEKING WAS MONEY DAMAGES, AND THEY WERE
12 SEEKING EQUITABLE -- INVOKING EQUITABLE AUTHORITY TO
13 PROTECT THEIR RIGHT TO RECOVER MONEY DAMAGES SO I
14 DON'T THINK IT WAS -- THAT THERE WAS NO EQUITY
15 INVOLVED IN WHAT THEY WERE SEEKING THERE, BUT IT WAS
16 ULTIMATELY AN ACTION FOR MONEY DAMAGES. AT LEAST IN A
17 VERY QUICK READING OF THE CASE, THAT'S WHAT I TAKE
18 FROM IT. GIVE ME A MINUTE, AND LET ME READ THE RAHMAN
19 CASE.

20 (COURT READS CASE)

21 THE COURT: MR. SCHWARTZ, YOU REPRESENT
22 KOZLOWSKI, RIGHT? THAT'S YOUR NAME, SCHWARTZ? ARE
23 YOU THERE, COUNSEL?

24 MR. SCHWARTZ: YES, YOUR HONOR. I'M HERE,
25 AND I DO REPRESENT MR. KOZLOWSKI.

1 THE COURT: AND YOUR NAME IS SCHWARTZ, RIGHT?

2 I COULDN'T REMEMBER YOUR NAME.

3 MR. SCHWARTZ: YES, YOUR HONOR.

4 THE COURT: IN THE GRUPO MEXICANO CASE YOU
5 SHOULD NOTE THAT THE COURT THERE TALKS ABOUT A
6 QUOTE -- HAS A QUOTE IN IT THAT -- REFERRING TO I
7 BELIEVE THE DE BEERS CASE THAT ALSO RAHMAN CITES --
8 THAT A PRELIMINARY INJUNCTION IS ALWAYS APPROPRIATE TO
9 GRANT INTERMEDIATE RELIEF OF THE SAME CHARACTER AS
10 THAT WHICH MAY BE GRANTED FINALLY, AND SO WHERE YOU
11 ARE -- IF YOU'VE GOT AN ACTION FOR A FRAUDULENT
12 TRANSFER AND YOU'RE SEEKING THE RETURN OF THE PROPERTY
13 THAT WAS FRAUDULENTLY TRANSFERRED, THE ULTIMATE ORDER
14 THAT YOU'RE ENTERING IS IN EQUITY AND YOU HAVE THE
15 POWER TO ORDER THE RETURN OF THE FRAUDULENT TRANSFER
16 AND YOU HAVE THE POWER TO -- ON AN INTERMEDIATE
17 BASIS -- PRESERVE THE ASSET WHICH HAS ALLEGEDLY BEEN
18 FRAUDULENTLY TRANSFERRED FROM BEING DISSIPATED.

19 WHEN THERE'S AN ACTION FOR A CONSTRUCTIVE
20 TRUST, THE IMPOSITION OF THE CONSTRUCTIVE TRUST IS AS
21 TO CERTAIN PROPERTY, AND YOU HAVE THE POWER TO
22 PRESERVE THAT PROPERTY PENDING A FINAL ORDER OF THE
23 COURT.

24 WHAT THE COURT SEEMED TO BE MOST DISTURBED
25 ABOUT IN THE GRUPO MEXICANO CASE IS THAT THE EQUITABLE

1 RELIEF BEING SOUGHT WAS NOT -- WAS IN A SENSE
2 COLLATERAL TO THE CENTRAL RELIEF IN THE CASE. IT WAS
3 A MEANS OF SECURING RECOVERY OF THE MONEY DAMAGES, BUT
4 THE CLAIMS THEMSELVES AT ISSUE THERE WERE NOT TO
5 PROTECT THE PARTICULAR ASSET FROM DISSIPATION, WHICH
6 IS WHAT YOU'RE REALLY DOING IN A CASE OF A
7 CONSTRUCTIVE TRUST OR IN A FRAUDULENT TRANSFER, ISN'T
8 IT?

9 MR. SCHWARTZ: I UNDERSTAND THE POINT, YOUR
10 HONOR, YES.

11 THE COURT: AND THE RAHMAN CASE IS A CASE
12 THAT DEALT NOT JUST WITH A TRACTOR. IT DEALT WITH
13 CASH, AND THAT'S THE CONCLUSION I THINK THAT THE
14 FOURTH CIRCUIT REACHED AND THAT I WAS HINTING AT WAS
15 THE KIND OF COMMON SENSE CONCERN THAT I WAS TRYING TO
16 RAISE, AND THAT'S THE BASIS ON WHICH RAHMAN
17 DISTINGUISHED GRUPO MEXICANO, AND YOU HAVE HAD THE
18 BENEFIT OF TYCO'S BRIEFS OVER THE WEEKEND SO I'M SURE
19 YOU'VE READ THE RAHMAN CASE.

20 MR. SCHWARTZ: YES, YOUR HONOR.

21 THE COURT: WHY AM I MISINTERPRETING IT?

22 MR. SCHWARTZ: I DON'T THINK YOU'RE
23 MISINTERPRETING RAHMAN, YOUR HONOR, BUT THE DIFFERENCE
24 BETWEEN THE SITUATION BEFORE YOUR HONOR AND RAHMAN IS
25 THAT IN THIS INSTANCE THE \$98 MILLION THAT TYCO

1 ALREADY HAS DOES REPRESENT THE FULL MEASURE OF THE
2 ALLEGED FRAUDULENT TAKINGS THAT WERE SUBJECT OF THE
3 CRIMINAL CASE WHERE --

4 THE COURT: WELL, LET'S SET ASIDE THE SHORT
5 SWING SALES PROFITS. MAYBE YOU'VE GOT A POINT AS TO
6 THAT, AND I HAVEN'T BEEN OVER THIS IN DETAIL IN A LONG
7 TIME, BUT IF YOU TAKE THE KEL LOAN PROGRAM FRAUD AND
8 THE RELOCATION PROGRAM FRAUD AND THE FRAUDULENT BONUS
9 PAYMENTS THAT HE CAUSED TO BE PAID TO HIMSELF, I'M
10 THINKING THAT WAS IN THE HUNDREDS OF MILLIONS OF
11 DOLLARS -- AT LEAST THAT'S WHAT TYCO HAS ALLEGED --
12 NOT THE \$98 MILLION THAT THEY GOT IN THE CRIMINAL
13 CASE.

14 MR. SCHWARTZ: YOUR HONOR, THE LOANS, WITH I
15 THINK ONE EXCEPTION, WERE REPAID BEFORE MR. KOZLOWSKI
16 LEFT THE COMPANY. OKAY. THE ONLY BONUSES THAT I'M
17 AWARE OF THAT TYCO ALLEGES WERE FRAUDULENT ARE THE
18 ONES THAT WERE -- THE FOUR BONUSES THAT WERE THE
19 SUBJECT OF THE CRIMINAL PROSECUTIONS, AND THEY DO MAKE
20 OTHER ALLEGATIONS. IN THEIR PAPERS TO YOUR HONOR ON
21 FRIDAY THEY MAKE REFERENCE TO A FIFTH AVENUE APARTMENT
22 AND SOME ARTWORK. WHAT THEY FAIL TO TELL YOUR HONOR
23 IS THAT WHEN MR. KOZLOWSKI LEFT THE COMPANY IN 2002,
24 THAT APARTMENT, WHICH WAS ALWAYS CARRIED ON THE BOOKS
25 OF THE COMPANY, WAS RETAINED BY THE COMPANY, ALL OF

1 THE ARTWORK WAS RETAINED BY THE COMPANY. WE DON'T
2 KNOW WHETHER THE COMPANY STILL HAS THAT ARTWORK OR
3 WHETHER THEY'VE LIQUIDATED IT, BUT IT ALREADY HAS THE
4 VALUE -- THE ACTUAL ITEMS AND THE VALUE THOSE ITEMS
5 REPRESENT.

6 THEY TALK ABOUT COMPENSATION PAID TO OTHERS.
7 THEY DON'T IDENTIFY WHO THOSE PEOPLE MIGHT BE, BUT
8 CERTAINLY THE TWO LARGEST PEOPLE ON THAT LIST WOULD
9 HAVE TO BE MARK SWARTZ AND FRANK WALSH, BOTH OF WHOM
10 HAVE ALSO PAID FULL RESTITUTION PURSUANT TO THEIR OWN
11 CRIMINAL --

12 THE COURT: ALL RIGHT. LET ME JUST BACK UP
13 HERE. THIS COULD BE IMPORTANT TO ME. YOUR POSITION
14 IS THAT ANY MONIES THAT MR. KOZLOWSKI RECEIVED UNDER
15 ANY OF THE BONUS PROGRAMS THAT ARE ALLEGED IN THE
16 BOISE REPORT OR ANY OF THE LOAN PROGRAMS ALLEGED IN
17 THE BOISE REPORT WERE ALL FULLY REPAID BY MR.
18 KOZLOWSKI TO TYCO SO THAT THOSE ARE NOT MONIES THAT
19 TYCO CAN CLAIM THAT IT'S SEEKING TO RECOVER TODAY.
20 THAT'S BASICALLY WHAT YOU'RE SAYING, RIGHT?

21 MR. SCHWARTZ: BASICALLY, YES, YOUR HONOR.
22 THERE'S ONE EXCEPTION THAT I'M AWARE OF, AND THAT'S
23 FOR A SINGLE LOAN THAT I THINK THERE'S AN OPEN
24 QUESTION AS TO WHETHER THAT'S BEEN REPAID, BUT IT'S
25 NOT A MATERIAL AMOUNT IN THE SCHEME OF WHAT TYCO IS

1 TALKING ABOUT, AND ALSO I WOULD JUST ADD WITH REGARDS
2 TO HOW WELL-SECURED TYCO ALREADY IS, IT ISN'T JUST THE
3 COURT ORDERED RESTITUTION THAT THEY HAVE RECEIVED FROM
4 MR. KOZLOWSKI -- MR. KOZLOWSKI, SWARTZ AND WALSH.
5 THEY ALSO HAVE ENGAGED IN WHAT WE WOULD CALL
6 AGGRESSIVE SELF-HELP TO THE TUNE OF SEVERAL HUNDRED
7 MILLIONS OF DOLLARS OF COMPENSATION THAT WAS
8 AUTHORIZED AND APPROVED BY THE BOARD, EARNED BY MR.
9 KOZLOWSKI AND DEFERRED BY MR. KOZLOWSKI PURSUANT TO
10 THE CONTRACTS HE HAD WITH THE COMPANY, ALL OF WHICH
11 TYCO HAS REFUSED TO PAY FOR THE LAST SIX YEARS, AND
12 THAT IS THE SUBJECT OF OUR COUNTERCLAIMS.

13 THE COURT: I'M MORE INTERESTED IN OTHER
14 THINGS RIGHT NOW. WHAT IS THE SPECIFIC LOSSES THAT
15 THE \$98 MILLION ORDERED IN THE CRIMINAL ACTION -- WHAT
16 WERE THE SPECIFIC LOSSES THAT WERE BEING COVERED BY
17 THE \$98 MILLION?

18 MR. SCHWARTZ: THEY WERE THE FOUR BONUSES,
19 YOUR HONOR. I'M NOT SURE I CAN IDENTIFY THEM ALL BY
20 NAME, BUT THERE WAS TYCOM -- MR. HAMID, WHO IS HERE
21 WITH ME, HE HAS THE LIST.

22 THE COURT: OKAY.

23 MR. HAMID: THERE'S THE TYCOM BONUS, THE ADT
24 BONUS, THE TELECOM BONUS AND THEN ALSO A 1999 LOAN
25 FORGIVENESS ON THE KEL -- THE KEY EMPLOYEE LOAN

1 PROGRAM.

2 THE COURT: ALL RIGHT. LET ME STOP AND ASK
3 TYCO. YOU AGREE AS TO THOSE MONIES YOU'VE RECEIVED,
4 YOU'VE ALREADY RECEIVED PAYMENT AS RESTITUTION IN THE
5 CRIMINAL ACTION, RIGHT?

6 MS. EDWARDS: YES, YOUR HONOR, FOR THOSE
7 SPECIFIC ITEMS.

8 THE COURT: OKAY. SO THOSE ARE OFF THE TABLE
9 IN TERMS OF THIS THEORY THAT I'M JUST TRYING TO GET
10 MONEY BACK THAT WAS WRONGFULLY TAKEN FROM ME.

11 MR. SCHWARTZ ALSO ALLEGES THAT IN ADDITION TO
12 THAT -- YOUR ALLEGATIONS ABOUT OTHER LOAN PROGRAMS --
13 THAT ALL THOSE LOANS WERE FULLY REPAID BY MR.
14 KOZLOWSKI AND SO YOU'RE NOT ENTITLED TO ANY RECOVERY
15 OF MONEY FOR THAT SO THIS INJUNCTION ISN'T TO PROTECT
16 YOUR RIGHT TO RECOVER YOUR OWN MONEY FOR THOSE THINGS.

17 SO YOU TAKE OUT THE BONUS PROGRAMS AND THE
18 LOAN PROGRAMS. WHAT'S LEFT THAT IS -- I KNOW YOU HAVE
19 MANY CLAIMS THAT YOU'VE BEEN INJURED BY KOZLOWSKI, BUT
20 WHAT IS THE -- WHAT ARE YOUR CLAIMS THAT HE HAS OUR
21 MONEY THAT WE GAVE HIM THAT WE NEED TO PROTECT FROM
22 DISSIPATION AND THAT'S WHY WE NEED AN INJUNCTION?

23 MR. BEIL: YOUR HONOR, THERE ARE SEVERAL.
24 THE FIRST IS A RETURN OF \$325 MILLION IN W-2
25 COMPENSATION PAID TO MR. KOZLOWSKI BETWEEN '95 AND

1 2002. UNDER THE FAITHLESS SERVANT OR DISLOYAL AGENT
2 DOCTRINE WHEN AN AGENT OR A SERVANT VIOLATES HIS DUTY
3 OF TRUST, DUTY OF LOYALTY, FIDUCIARY DUTY TO HIS
4 PRINCIPAL, TO HIS EMPLOYER, ALL OF THE COMPENSATION
5 PAID TO HIM DURING THAT PERIOD OF TIME CAN BE RETURNED
6 UNDER A CONSTRUCTIVE TRUST --

7 THE COURT: STOP FOR A SECOND. WHEN YOU SAY
8 THE \$325 MILLION IN W-2 COMPENSATION, YOU'RE SAYING
9 THIS IS IN ADDITION TO THE OTHER -- THE BONUSES THAT
10 WE'VE TALKED ABOUT?

11 MR. BEIL: YES, SIR.

12 THE COURT: ALL RIGHT. SO THIS IS JUST
13 ORDINARY COMPENSATION TO MR. KOZLOWSKI DURING THAT
14 PERIOD?

15 MR. BEIL: I'M NOT SURE I WOULD USE THE WORD
16 ORDINARY, BUT IT IS CERTAINLY COMPENSATION HE WAS PAID
17 AND WAS REPORTED TO THE FEDERAL GOVERNMENT AND THE
18 STATE GOVERNMENT. THERE WAS ALSO ANOTHER \$120 MILLION
19 IN UNAUTHORIZED BONUSES THAT HE AWARDED TO SENIOR
20 EXECUTIVES OTHER THAN HIMSELF.

21 THE COURT: WELL, THAT'S NOT THE RETURN OF
22 MONEY THAT HE HAS THAT HE TOOK. THAT'S THAT YOU WANT
23 HIM TO COVER YOU FOR BAD THINGS THAT HE DID WHERE HE
24 GAVE MONEY TO OTHER PEOPLE.

25 MR. BEIL: WELL, YEAH, BUT I THINK WE ALSO

1 HAVE AN UNJUST ENRICHMENT THEORY ALONG THOSE LINES, AS
2 WELL, AND THEN THERE WERE CONTRIBUTIONS TO OTHERS THAT
3 WERE MADE BY TYCO IN HIS NAME SO THAT THOSE ARE
4 STATEMENTS THAT, IN FACT, EVEN THOUGH THE MONEY DIDN'T
5 GO TO HIM, IT WENT TO OTHERS ON HIS DIRECTION FOR
6 WHICH HE WAS UNJUSTLY ENRICHED FOR WHICH WE SEEK THE
7 RETURN OF MONIES, AS WELL, BUT THE \$325 MILLION IN
8 COMPENSATION THAT HE HAS TO RETURN IS MORE THAN
9 ADEQUATE TO SUPPORT THE KIND OF INJUNCTION WE'RE
10 SEEKING HERE.

11 THE COURT: ALL RIGHT. I'M TRYING TO DRAW A
12 DISTINCTION BETWEEN MONIES THAT BASICALLY THAT TYCO IS
13 CLAIMING THAT KOZLOWSKI TOOK FROM THE COMPANY AND HAS
14 AND OTHER KINDS OF CLAIMS FOR DAMAGES THAT THE COMPANY
15 MAY HAVE AGAINST MR. KOZLOWSKI, AND I'M ASKING MYSELF,
16 DO I HAVE THE POWER, ASSUMING THE OTHER REQUIREMENTS
17 FOR A TRO ARE PRESENT, TO ENJOIN MR. KOZLOWSKI FROM
18 TRANSFERRING THOSE MONIES THAT WERE WRONGFULLY TAKEN
19 BY HIM FROM THE COMPANY. THAT'S WHAT I'M LOOKING AT,
20 AND THE THEORY THAT TYCO HAS ABDICATED IS THE W-2
21 INCOME AND CERTAIN OTHER BONUSES -- THEY'VE GOT OTHER
22 ARGUMENTS ABOUT MONIES PAID TO THIRD PARTIES, BUT I
23 DON'T THINK THAT'S REALLY USEFUL TO FOCUS ON THEM SO
24 WHAT DO YOU WANT TO SAY IN RESPONSE TO THAT, MR.
25 SCHWARTZ?

1 MR. SCHWARTZ: LET ME SPEAK TO THAT THEN,
2 YOUR HONOR. FIRST OF ALL, MOST OF WHAT MR. BEIL
3 REFERS TO AS \$325 MILLION IN W-2 COMPENSATION WAS
4 DEFERRED COMPENSATION WHICH TYCO, IN FACT, STILL HAS.
5 IT'S THE SUBJECT OF THE COUNTERCLAIM. SO IT'S NOT
6 RIGHT TO THINK THAT \$325 MILLION ACTUALLY CHANGED
7 HANDS AND IS NOW IN THE CONTROL --

8 THE COURT: LET ME STOP YOU. IS THAT TRUE?

9 MR. BEIL: I DON'T BELIEVE SO, YOUR HONOR,
10 THOUGH I CAN'T SAY THAT I --

11 THE COURT: THAT'S KIND OF IMPORTANT TO THE
12 ANALYSIS, RIGHT, IF YOU'RE SAYING, HE STOLE OUR MONEY
13 IN THIS AMOUNT AND WE NEED TO SECURE IT FROM BEING
14 DISSIPATED, BUT WE HAVEN'T GIVEN IT TO HIM YET, THAT'S
15 NOT A VERY GOOD ARGUMENT.

16 MS. EDWARDS: NO, YOUR HONOR. THAT'S IN
17 ADDITION. THE DEFERRED COMPENSATION IS NOT COUNTED IN
18 THE CALCULOUS OF THE NUMBERS THAT MR. BEIL WAS TALKING
19 ABOUT.

20 THE COURT: ALL RIGHT.

21 MR. SCHWARTZ: THAT'S WRONG, YOUR HONOR.

22 THE COURT: OKAY. YOU GUYS DISAGREE ABOUT
23 THAT, THEN. LET'S PUT THAT IN THE COLUMN OF WE
24 DISAGREE. MR. SCHWARTZ SAYS SOME SUBSTANTIAL PORTION
25 OF THAT \$325 MILLION IN W-2 INCOME IS INCOME ON WHICH

1 HE HAD TO DECLARE IT FOR TAX PURPOSES BUT WAS NOT
2 ACTUALLY RECEIVED BY HIM IS, IN FACT, STILL BEING, HE
3 SAYS, WRONGLY WITHHELD BY TYCO, AND TYCO SAYS, NO, IN
4 FACT THE \$325 MILLION IS MONEY THAT ALREADY WENT INTO
5 HIS POCKET.

6 MR. SCHWARTZ: THERE ARE OTHER REASONS WHY
7 THE ARGUMENT FAILS, BUT THAT WOULD BE A STARTING POINT
8 ON A FACTUAL LEVEL, YOUR HONOR.

9 THE COURT: ALL RIGHT. HOW DO WE ESTABLISH
10 WHICH OF YOU IS RIGHT ON THAT?

11 MS. EDWARDS: WELL, YOUR HONOR, WE MAY BE
12 WRONG ON THE TOTAL AMOUNT, BUT AT LEAST A SUBSTANTIAL
13 PORTION OF THE W-2 COMPENSATION, IT'S OUR
14 UNDERSTANDING, WAS ACTUALLY PAID TO MR. KOZLOWSKI, IF
15 NOT ALL OF THE \$325 MILLION.

16 THE COURT: I THINK TYCO WOULD HAVE RECORDS
17 THAT WOULD SHOW WHAT WAS PAID TO THEIR CEO AND WHAT
18 WASN'T, RIGHT?

19 MS. EDWARDS: WE DO, YOUR HONOR. I JUST
20 DON'T HAVE THEM.

21 THE COURT: ALL RIGHT. YOU COULD GET THEM IF
22 WE NEEDED TO AND FILE THEM WITH ME AND SAY, OF THAT
23 \$325 MILLION HE ACTUALLY RECEIVED \$250 MILLION, AND
24 HERE'S THE RECORDS TO SHOW IT.

25 MR. BEIL: YES, WE CAN, YOUR HONOR, AND I

1 BELIEVE IT'S GOING TO BE A SMALL NUMBER THAT WAS
2 DEFERRED.

3 THE COURT: ALL RIGHT.

4 MR. SCHWARTZ: WE'LL AWAIT THOSE RECORDS,
5 YOUR HONOR, BECAUSE WE DO DISAGREE ON THAT.

6 THE COURT: ALL RIGHT. NOW, LET'S ASSUME
7 THAT THEY'RE RIGHT AS A MATTER OF FACT. DO YOU HAVE
8 OTHER ARGUMENTS AS TO WHY THAT \$325 MILLION SHOULD --
9 LET ME TRY TO GET DOWN TO YOUR ARGUMENTS.

10 YOUR FIRST ARGUMENT IS GRUPO MEXICANO -- THIS
11 CASE IS CONTROLLED BY THAT. IT DOESN'T MATTER WHETHER
12 HE WRONGFULLY GOT THE MONEY. IT DOESN'T MATTER
13 WHETHER THEY'RE BRINGING AN ACTION FOR A CONSTRUCTIVE
14 TRUST. YOU JUST DO NOT HAVE THE POWER TO DO THIS,
15 RIGHT? THAT'S YOUR FIRST ARGUMENT.

16 YOUR SECOND ARGUMENT IS, TO THE EXTENT THAT
17 THEY HAVE A CLAIM THAT HE'S WRONGFULLY ACQUIRED
18 \$300 MILLION OF OUR ASSETS AND IN FACT HE DID GET
19 \$300 MILLION OF OUR -- OR EXCUSE ME. TO THE EXTENT
20 THEY CLAIM THAT, THEY'RE JUST WRONG, AS A MATTER OF
21 FACT. HE DIDN'T GET \$300 MILLION, AND AS TO ALL THE
22 OTHER MONEY THEY SAY WE TOOK FROM TYCO, HE'S EITHER
23 PAID THAT BACK IN THE FORM OF RESTITUTION OR PAID IT
24 BACK WHEN HE MADE PAYMENTS OF LOANS.

25 THEN YOUR THIRD ARGUMENT IS, IN ANY EVENT,

1 TYCO HAS MORE THAN ADEQUATE SECURITY BECAUSE IT'S
2 WITHHOLDING DEFERRED COMPENSATION THAT WE'RE ENTITLED
3 TO THAT MORE THAN MAKES UP FOR THE DIFFERENCE.

4 SO ON TOP OF THAT NOW YOU HAVE ANOTHER
5 ARGUMENT. WHAT IS THAT?

6 MR. SCHWARTZ: YOUR HONOR, WITH REGARDS TO
7 THIS FAITHLESS SERVANT DOCTRINE THAT MR. BEIL JUST
8 REFERENCED WHICH ESSENTIALLY -- IT'S A DOCTRINE UNDER
9 NEW YORK LAW WHICH IN CERTAIN CIRCUMSTANCES PERMITS
10 THE EMPLOYER OR THE PRINCIPAL TO BASICALLY CLAW BACK
11 ALL OF THE COMPENSATION THAT WAS PAID TO AN AGENT
12 WHERE THAT AGENT ACTED IN A WAY THAT WAS DISLOYAL AND
13 HARMFUL AND WHERE IT PERMEATED THE RELATIONSHIP. THAT
14 NEW YORK DOCTRINE IS NOT APPLICABLE IN THIS CASE AS A
15 MATTER OF CHOICE OF LAW.

16 AS YOUR HONOR WILL RECALL, TYCO HAS IN THE
17 PAST SUCCESSFULLY ARGUED BOTH IN YOUR HONOR'S COURT,
18 BUT ALSO IN OTHER COURTS WHERE THIS MATTER HAS BEEN
19 LITIGATED, THAT THE LAW OF BERMUDA, THE JURISDICTION
20 WHERE TYCO IS INCORPORATED, GOVERNS THE ALLEGED BREACH
21 OF FIDUCIARY DUTY CLAIMS, WHICH IS WHAT GIVES RISE TO
22 THE FAITHLESS SERVANT DOCTRINE.

23 THE COURT: YOU'RE NOT TELLING ME I HAVE TO
24 GO BACK AND APPLY FOSS V. HARBOTTLE AGAIN, DO I?

25 MR. SCHWARTZ: WELL, YOUR HONOR, THE SAME

1 PRINCIPLE UNDER FOSS WOULD BE APPLICABLE HERE AND
2 WOULD AGAIN POINT TO BERMUDA LAW, AND I CAN TELL YOU
3 FROM OUR OWN CONSULTATIONS WITH BERMUDA LAW EXPERTS,
4 THERE IS NO SUCH THING AS THE FAITHLESS SERVANT
5 DOCTRINE RECOGNIZED UNDER BERMUDA LAW, AND UNDER U.K.
6 LAW -- WHICH YOUR HONOR MAY RECALL BERMUDA LAW
7 TYPICALLY LOOKS TO IN THE ABSENCE OF ITS OWN
8 PRECEDENCE -- THERE ARE PRECEDENCE TO THE CONTRARY.

9 SO THIS RATHER OBSCURE DOCTRINE THAT THEY'RE
10 INVOKING WHICH DOES EXIST IN NEW YORK LAW HAS NO
11 APPLICATION IN THE CASE BEFORE YOUR HONOR INVOLVING
12 MR. KOZLOWSKI.

13 THERE ARE OTHER REASONS THAT WE DON'T
14 BELIEVE, EVEN IF NEW YORK LAW WERE TO APPLY, THAT THE
15 FAITHLESS SERVANT DOCTRINE WOULD JUSTIFY BASICALLY
16 CLAWING BACK 100 PERCENT OF THE COMPENSATION THAT MR.
17 KOZLOWSKI RECEIVED FOR HIS VERY SUCCESSFUL STEWARDSHIP
18 OF TYCO DURING THE TIME THAT HE WAS THE CEO.

19 AS TYCO, ITSELF, HAS ARGUED IN THE PAST, THE
20 ALLEGED LOOTING INCIDENTS WERE ISOLATE IN THE OVERALL
21 CONTEXT OF WHAT TYCO WAS DOING. THEY MADE THAT
22 ARGUMENT WHEN THEY WERE DEFENDING SUCH CLAIMS BROUGHT
23 AGAINST TYCO AND MR. KOZLOWSKI IN THE CLASS ACTIONS,
24 AND WHILE WE DON'T THINK THERE WAS ANY LOOTING, WE
25 CERTAINLY AGREE THAT THE PARTICULAR BONUSES AND LOANS

1 ARE ISOLATED INCIDENTS IN THE OVERALL STEWARDSHIP OF
2 MR. KOZLOWSKI'S SERVICE AS CEO AND CHAIRMAN OF THIS
3 COMPANY WHICH HE GREW FROM A RATHER MODEST COMPANY TO
4 AN ENORMOUSLY SUCCESSFUL INTERNATIONAL CONGLOMERATE,
5 TO THE BENEFIT OF THE SHAREHOLDERS. SO WE DON'T THINK
6 THAT IT APPLIES FOR ALL OF THOSE REASONS.

7 THE COURT: WELL, THAT'S AN ARGUMENT ON
8 LIKELIHOOD OF SUCCESS, RIGHT? YOUR THEORY IS THEY
9 CAN'T SUCCEED ON THE MERITS OF THEIR FAITHLESS SERVANT
10 CLAIM SO THEY'RE NOT ENTITLED TO A RESTRAINING ORDER
11 PREVENTING YOU FROM DISSIPATING MONIES THAT HE
12 ACQUIRED AS AN ALLEGEDLY FAITHLESS SERVANT OR FAITHFUL
13 SERVANT -- WHATEVER THE DOCTRINE IS. HAVE I GOT THAT
14 DOWN?

15 MR. SCHWARTZ: YES, BUT THAT'S NOT AN
16 EQUITABLE CLAIM THAT THEY'RE MAKING. THAT'S A LEGAL
17 CLAIM, AND I WOULD ALSO POINT OUT, YOUR HONOR, THAT
18 WHEN THEY INVOKED THE FAITHLESS SERVANT DOCTRINE,
19 THEY'RE NO LONGER SAYING MR. KOZLOWSKI STOLE THIS
20 MONEY AND NOW WE'RE TRYING TO GET BACK. THEY'RE
21 SAYING THAT MONEY THAT MR. KOZLOWSKI RECEIVED PURSUANT
22 TO COURT AUTHORIZATION FOR HIS COMPENSATION AND
23 SERVICE AS CEO IS UNDER THIS DOCTRINE SUBJECT TO BEING
24 CLAWED BACK.

25 THE COURT: FOR EXAMPLE, IF HE RECEIVES

1 COMPENSATION AND ENGAGED IN A SCHEME TO MAKE STOCK
2 PROFITS THAT DAMAGE THE COMPANY, THEY COULD GET THEIR
3 MONEY BACK UNDER THIS FAITHLESS SERVANT DOCTRINE --
4 THE MONEY THEY PAID HIM IN TERMS OF COMPENSATION --
5 AND THAT MONEY IS NOT MONEY THAT THEY'RE SAYING WAS
6 STOLEN. IT WAS JUST THAT HE DIDN'T ACT THE WAY HE
7 SHOULD HAVE ACTED, AND AS A RESULT HE FORFEITS HIS
8 RIGHT TO THE COMPENSATION?

9 MR. SCHWARTZ: I THINK THAT'S MY
10 UNDERSTANDING OF THEIR THEORY, YOUR HONOR, BUT IT
11 CERTAINLY DOESN'T FIT WITHIN THE CONFINES OF WHAT YOUR
12 HONOR HAS SET FORTH BEFORE, THAT THIS WAS A THEFT OR A
13 FRAUDULENT TRANSFER THAT THEY'RE NOW SEEKING A
14 CONSTRUCTIVE TRUST TO SECURE THE RETURN OF.

15 THIS WAS MONEY THAT WAS PAID TO
16 MR. KOZLOWSKI -- OR AUTHORIZED TO BE PAID TO MR.
17 KOZLOWSKI, PUTTING ASIDE FOR THE MOMENT HOW MUCH OF IT
18 HAS ACTUALLY BEEN RECEIVED VERSUS DEFERRED, BUT THIS
19 IS WHAT THE BOARD AUTHORIZED HE BE PAID. HE WAS VERY
20 WELL PAID, AND THERE WERE ALL SORTS OF THINGS THAT MR.
21 KOZLOWSKI SPENT HIS TIME DOING DURING HIS TENURE AS
22 CEO TO ADVANCE THE INTERESTS OF THE COMPANY, AND THEY
23 WANT ALL OF HIS COMPENSATION FOR AT LEAST SEVEN OF
24 THOSE YEARS FORFEITED UNDER THIS INAPPLICABLE NEW YORK
25 DOCTRINE SO I DON'T THINK IT RESULTS IN PRELIMINARY

1 RELIEF IN ANY CIRCUMSTANCE, AND AS I SAID, THERE IS
2 WHAT WE ESTIMATE TO BE SEVERAL HUNDRED MILLIONS OF
3 DOLLARS IN DEFERRED COMPENSATION THAT TYCO CONTINUES
4 TO HOLD IS MR. KOZLOWSKI'S.

5 THE COURT: I DON'T THINK THAT SERVES AS
6 SECURITY FOR THEM BECAUSE THEIR VIEW IS THAT THEY
7 DON'T OWE IT TO YOU, AND THE REASON THEY DON'T OWE IT
8 TO YOU IS IN PART BECAUSE OF THIS FAITHLESS SERVANT
9 DOCTRINE. THAT ARGUMENT DOESN'T REALLY CARRY MUCH
10 WEIGHT WITH ME.

11 MR. SCHWARTZ: EXCEPT THEY CAN'T RECOVER IT
12 TWICE. IF THEY DON'T OWE IT AND DON'T HAVE TO PAY
13 IT -- THEY'VE GOT THAT MONEY, AND THEY HAVE NO RIGHT
14 TO CLAW IT BACK FROM MR. KOZLOWSKI, MUCH LESS
15 PRELIMINARILY RESTRAIN --

16 THE COURT: THAT'S A VARIATION ON THE
17 \$325 MILLION THEY'RE TALKING ABOUT, JUDGE, NEVER WENT
18 INTO KOZLOWSKI'S POCKET. I UNDERSTAND THAT ARGUMENT.
19 ALL RIGHT. HAVE YOU GOT ANYTHING ELSE?

20 MR. SCHWARTZ: YOUR HONOR, I'M TRYING TO
21 RESPOND TO THE ARGUMENTS THAT WE SAW IN THEIR BRIEFS
22 ON FRIDAY, AND THEY DID MAKE THIS ARGUMENT ABOUT THE
23 APARTMENT AND THE ARTWORK, BUT PERHAPS MR. BEIL WILL
24 ACKNOWLEDGE THAT THEY STILL HAVE OR THEY'VE DISPOSED
25 OF THAT ARTWORK IN THOSE APARTMENTS SO I DON'T KNOW

1 HOW THEY COULD COME TO COURT AND ASK FOR SOME KIND OF
2 PRELIMINARY RESTRAINT ON MR. KOZLOWSKI'S ASSETS AS A
3 RESULT OF THOSE FACTS.

4 THE COURT: DO YOU WANT TO RESPOND, MR. BEIL?

5 MS. EDWARDS: WELL, YOUR HONOR -- THIS IS
6 ELIZABETH EDWARDS -- AND WHAT WE HAVE SOUGHT IN THE
7 CASE AGAINST MR. KOZLOWSKI IS A CONSTRUCTIVE TRUST FOR
8 ALL OF THE FUNDS AND BENEFITS HE'S RECEIVED, WHICH IS
9 PARAGRAPH 150 OF THE COMPLAINT AGAINST KOZLOWSKI, AND
10 IF -- YOU KNOW, THERE CLEARLY IS ENOUGH SET FORTH IN
11 THE PAPERS, THE EXACT PARTICULARS OF WHICH WE WOULD BE
12 PREPARED TO PRESENT TO THE COURT ON THE PRELIMINARY
13 INJUNCTION HEARING.

14 I APOLOGIZE IF THE PAPERS AREN'T AS PRECISE,
15 BUT TYCO'S PRINCIPAL COUNSEL AND I WERE TIED UP IN AN
16 OPT-OUT MEDIATION THE END OF THE WEEK WHEN MR. BEIL
17 WAS TRYING TO GET SOMETHING BEFORE THE COURT, AND I
18 THINK WE HAVE CERTAINLY SET FORTH SUFFICIENT -- AND
19 WILL HONE IN WITH PRECISION ON THE EXACT DOLLAR AMOUNT
20 AS WE MOVE FORWARD.

21 MR. BEIL: AND ON THE FAITHLESS SERVANT
22 DOCTRINE, YOUR HONOR, IT'S ACTUALLY AN OLD COMMON LAW
23 DOCTRINE. IT'S DESCRIBED IN SOME DETAIL IN THE
24 RESTATEMENT (SECOND) OF AGENCY, QUOTED AT PAGE 10 OF
25 OUR BRIEF FROM 1958, AND IT'S THE BASIC RULE -- IT IS

1 ACTUALLY A CONSTRUCTIVE TRUST CLAIM FOR DISGORGEMENT
2 WHERE A PRINCIPAL CAN SEEK THE DISGORGEMENT OF ALL
3 COMPENSATION PAID TO A FAITHLESS SERVANT OR A DISLOYAL
4 AGENT EVEN FOR PROPERLY PERFORMED SERVICES IF THE
5 AGENT DURING A PERIOD OF TIME WAS -- VIOLATED HIS DUTY
6 OF LOYALTY AND FIDUCIARY DUTIES TO THE AGENT OR THE
7 EMPLOYER.

8 THE COURT: DO YOU CONCEDE MR. SCHWARTZ'S
9 POINT THAT TO THE EXTENT YOU ARE MERELY SEEKING MONEY
10 DAMAGES AGAINST MR. KOZLOWSKI THAT GRUPO MEXICANO BARS
11 THE ISSUANCE OF A RESTRAINING ORDER OR A PRELIMINARY
12 INJUNCTION TO SECURE YOUR ABILITY TO SATISFY ANY MONEY
13 JUDGMENT THAT YOU OBTAIN?

14 MR. BEIL: I THINK THAT THAT'S NOT REALLY THE
15 APPROPRIATE QUESTION, YOUR HONOR. THE QUESTION IS --

16 THE COURT: WELL, YOU GUYS LIKE -- YOU
17 HAVEN'T DEALT WITH ME VERY MUCH, OKAY? TELLING ME
18 THAT MY QUESTION IS NOT THE APPROPRIATE QUESTION IS
19 NOT THE APPROPRIATE RESPONSE.

20 WHEN I ASK YOU A QUESTION, YOU ANSWER IT AND
21 THEN TELL ME WHY YOU THINK THE QUESTION IS
22 INAPPROPRIATE.

23 MR. BEIL: OKAY. THANK YOU, YOUR HONOR. I
24 MEANT NO DISRESPECT.

25 IF THIS CLAIM WAS ONLY FOR MONEY DAMAGES,

1 GRUPO MEXICANO WOULD PROBABLY GOVERN HERE, BUT THIS IS
2 NOT A CLAIM JUST FOR MONEY DAMAGES.

3 THE COURT: AND I UNDERSTAND THAT, AND SO
4 WHAT I'M TRYING TO FOCUS ON IS TO THE EXTENT -- YOU
5 CLEARLY ASSERT CLAIMS FOR BOTH MONEY DAMAGES AND
6 EQUITABLE RELIEF. DO YOU AGREE?

7 MR. BEIL: YES.

8 THE COURT: YOU APPEAR TO AGREE THAT TO THE
9 EXTENT THAT YOUR RIGHT TO INJUNCTIVE RELIEF STEMS
10 SOLELY FROM A DAMAGE CLAIM, THAT I WOULD HAVE NOT HAVE
11 THE AUTHORITY TO GRANT -- THE RIGHT TO A TRO AND A
12 PRELIMINARY INJUNCTION, THE ASSERTED RIGHT, DEPENDS
13 UPON DAMAGES THAT YOU CAN RECOVER RATHER THAN
14 EQUITABLE RELIEF TO WHICH YOU'RE ENTITLED, YOU WOULD
15 AGREE WITH ME THAT THE INJUNCTION CANNOT ISSUE AS TO
16 THOSE MONIES?

17 MR. BEIL: YES, IN WHICH CASE WE WOULD BE IN
18 A PREJUDGMENT ATTACHMENT KIND OF SITUATION.

19 THE COURT: EXACTLY, AND SO WHAT I'M TRYING
20 TO DO HERE IS SEGREGATE OUT -- BECAUSE YOU HAVE A LOT
21 OF CLAIMS FOR A LOT OF MONEY THAT YOU'RE ASSERTING
22 AGAINST MR. KOZLOWSKI. MANY OF THOSE CLAIMS ARE
23 REALLY COGNIZABLE ONLY AS MONEY DAMAGES CLAIMS, BUT
24 YOU HAVE SUBSTANTIAL CLAIMS THAT ARE EQUITABLE IN
25 NATURE, AND AS TO THOSE YOUR POSITION IS THAT GRUPO

1 MEXICANO IS INAPPLICABLE, RIGHT?

2 MR. BEIL: YES, SIR.

3 THE COURT: OKAY, AND WHEN WE LOOK AT -- IN
4 SIMPLIFIED FORM WHAT YOUR EQUITABLE CLAIMS ARE
5 ESSENTIALLY IS -- OR YOUR PRINCIPAL EQUITABLE CLAIMS
6 ARE MR. KOZLOWSKI TOOK OUR MONEY AND HE WASN'T
7 ENTITLED TO IT AND WE WANT IT BACK, AND AS A RESULT,
8 WE WANT EQUITABLE RELIEF TO ENSURE THAT WE GET OUR
9 MONEY BACK, RIGHT?

10 MR. BEIL: WELL, IT'S A CONSTRUCTIVE TRUST
11 CLAIM, WHICH IS CLEARLY AN EQUITABLE CLAIM, YES.

12 THE COURT: RIGHT, AND WHEN WE GOT INTO WHAT
13 IS THE AMOUNT OF MONEY THAT YOU ARE ALLEGING THAT
14 KOZLOWSKI TOOK FROM YOU THAT HE WAS NOT ENTITLED TO
15 AND THAT IS SUBJECT TO YOUR CONSTRUCTIVE TRUST CLAIM,
16 WE'VE IDENTIFIED A VARIETY OF THINGS.

17 IN YOUR PLEADINGS I THOUGHT YOU WERE FOCUSING
18 ON A LOT OF THINGS THAT WERE SET FORTH IN THE BOISE
19 REPORT, AND IT SEEMS THAT AS TO MANY OF THOSE THINGS
20 EITHER THE MONEY WAS REPAID BY KOZLOWSKI OR YOUR
21 INTERESTS HAVE BEEN SATISFIED BY THE PAYMENT OF THE
22 RESTITUTION ORDER IN THE CRIMINAL CASE.

23 WHAT WE'RE LEFT WITH -- THE PRINCIPAL THING
24 THAT WE'RE LEFT WITH, IT SEEMS TO ME, THAT YOU WOULD
25 SAY FITS WITHIN YOUR CONSTRUCTIVE TRUST CLAIM IS WHAT

1 YOU SAY ARE THE \$325 MILLION THAT WAS PAID TO HIM IN
2 COMPENSATION REPORTED ON HIS W-2S, AND YOU'RE SAYING
3 THAT AS TO THAT, YOU'RE ENTITLED TO A CONSTRUCTIVE
4 TRUST, THE RELIEF YOU'RE SEEKING IS EQUITABLE IN
5 NATURE, GRUPO MEXICANO IS INAPPLICABLE AND YOU ARE
6 ENTITLED TO A TEMPORARY RESTRAINING ORDER OR
7 PRELIMINARY INJUNCTION AS TO THOSE AMOUNTS.

8 AM I UNDERSTANDING YOUR CLAIM CORRECTLY AS
9 IT'S BEEN REFINED DURING THE DISCUSSION THIS MORNING?

10 MR. BEIL: YES, SIR.

11 THE COURT: OKAY, AND AS TO THAT, MR.
12 KOZLOWSKI IS SAYING, FIRST, GRUPO MEXICANO STILL
13 APPLIES TO THOSE MONIES. SECOND, THE \$325 MILLION --
14 A SUBSTANTIAL PORTION OF IT IS DEFERRED COMPENSATION.
15 IT'S STILL IN TYCO'S HANDS. TYCO DOESN'T NEED ANY
16 EQUITABLE RELIEF AS TO THOSE; AND THIRD, THE WHOLE
17 THEORY ON WHICH THE CLAIM FOR \$325 MILLION IS BASED IS
18 A THEORY THAT DOES NOT EXIST UNDER THE LAW THAT WILL
19 GOVERN THE RESOLUTION OF TYCO'S CLAIMS AGAINST
20 KOZLOWSKI.

21 HAVE I GOT YOUR PRINCIPAL ARGUMENTS RIGHT,
22 MR. SCHWARTZ?

23 MR. SCHWARTZ: YOU HAVE MANY OF THEM; YES,
24 YOUR HONOR. WHAT YOU'VE SET FORTH IS CORRECT, AND
25 I'LL STOP THERE. THERE'S OTHER THINGS WE WOULD SAY

1 BUT --

2 THE COURT: AM I MISSING ANY OF YOUR MAJOR
3 ARGUMENTS? BECAUSE I HAVEN'T GIVEN YOU A CHANCE TO
4 FILE A BRIEF YET.

5 MR. SCHWARTZ: YES, YOUR HONOR, AND I DID
6 ALLUDE TO THIS EARLIER, BUT OBVIOUSLY ANY FORM OF
7 PRELIMINARY RELIEF, ESPECIALLY ONE SOUGHT SIX YEARS
8 INTO THE LITIGATION, REQUIRES A SHOWING OF IRREPARABLE
9 HARM, AND THAT HAS TO BE BASED ON SOMETHING MORE THAN
10 SPECULATION OR CONJECTURE.

11 AS WE READ THEIR PAPERS, THEY HAVE SIMPLY
12 POINTED TO SOME RECENT PRESS REPORTS OF THE KOZLOWSKI
13 DIVORCE AND CONCLUDED OR SPECULATED FROM THAT THAT IT
14 MUST HAVE BEEN A SHAM OR OVERLY GENEROUS BECAUSE THERE
15 WERE NO CHILDREN, BECAUSE THE MARRIAGE WAS FOR I
16 BELIEVE ONLY FIVE OR SEVEN YEARS. THAT'S NOT EVIDENCE
17 THAT GIVES RISE TO A RECOGNIZED BASIS FOR FINDING
18 THERE'S IRREPARABLE HARM THAT REQUIRES PRELIMINARY
19 RELIEF AT THIS STAGE IN THESE PROCEEDINGS.

20 WE DON'T THINK THERE IS ANY EVIDENCE THAT
21 THEY POINTED TO, AND WE DON'T THINK THAT IN THESE
22 CIRCUMSTANCES THE NORMAL PRACTICE FOR PREJUDGMENT
23 CIVIL PLAINTIFFS OUGHT TO BE PUT ASIDE AND
24 EXTRAORDINARY RELIEF PROVIDED AT THIS POINT.

25 THE COURT: ALL RIGHT. WELL, HERE'S THE

1 SITUATION I FIND MYSELF IN, AND I'M OPEN TO YOUR
2 SUGGESTIONS AS TO HOW TO PROCEED. I AM WELL SATISFIED
3 THAT TYCO FACES A SIGNIFICANT RISK OF IRREPARABLE HARM
4 IF SOME KIND OF INJUNCTIVE RELIEF IS NOT GRANTED HERE.

5 BASED ON THE REPORTS THAT HAVE BEEN
6 PROVIDED TO ME, THERE'S REASON TO BELIEVE THAT THIS IS
7 A FRIENDLY DIVORCE IN WHICH THE PARTIES ARE
8 COOPERATING. THE PUBLIC COMMENTS ABOUT THE DIVORCE
9 SUGGEST THAT MRS. KOZLOWSKI WILL BE LEFT WITH
10 MILLIONS. THE DIVORCE TERMS ARE SEALED, ARE
11 UNAVAILABLE TO US AT THE PRESENT TIME AND UNDER THE
12 CIRCUMSTANCES HERE WHERE MR. KOZLOWSKI AND MRS.
13 KOZLOWSKI WELL KNOW THAT HE FACES LONG-STANDING CLAIMS
14 THAT HE IS LIABLE TO TYCO FOR HUNDREDS OF MILLIONS OF
15 DOLLARS IN DAMAGES AND EQUITABLE RELIEF, THERE'S VERY
16 STRONG REASON TO BE CONCERNED THAT THERE WILL IN FACT
17 BE A TRANSFER OF ASSETS THAT OTHERWISE WOULD BE ABLE
18 TO SATISFY ANY EQUITABLE OR LEGAL JUDGMENT THAT'S
19 ENTERED IN THE CASE, AND THAT IS A RECOGNIZED FORM OF
20 IRREPARABLE DAMAGES THAT CAN SUPPORT A CLAIM FOR
21 INJUNCTIVE RELIEF IN AN APPROPRIATE CASE -- SUBJECT TO
22 THE GRUPO MEXICANO PROBLEM THAT I'M GOING TO TALK
23 ABOUT IN A MOMENT.

24 I THINK THAT -- I HAVEN'T HEARD A LOT OF
25 ARGUMENT FROM MR. SCHWARTZ ABOUT BALANCE OF HARDSHIPS

1 AND PUBLIC INTEREST, BUT IT SEEMS TO ME THE BALANCE OF
2 HARDSHIPS AND PUBLIC INTEREST STRONGLY FAVOR GRANTING
3 SOME KIND OF INJUNCTIVE RELIEF HERE.

4 AS TO THE LIKELIHOOD OF SUCCESS ON THE
5 MERITS, I THINK TYCO HAS MADE A GOOD ARGUMENT WITH
6 RESPECT TO LIKELIHOOD OF SUCCESS ON THE MERITS, BUT I
7 AM TROUBLED BY MR. SCHWARTZ'S RESPONSE CONCERNING THE
8 FAITHLESS SERVANT DOCTRINE, AND I AM CONCERNED ABOUT
9 EXACTLY HOW THE GRUPO MEXICANO ARGUMENT APPLIES IN THE
10 FACTS OF THIS CASE, AND I AM CONCERNED THAT I HAVEN'T
11 HAD A CHANCE TO GET FULL BRIEFING ON THIS ISSUE FROM
12 MR. SCHWARTZ, AND I WANT TO RECEIVE BRIEFING ON THIS
13 ISSUE, AS WELL AS TO RECEIVE FURTHER SUPPORT FROM TYCO
14 CONCERNING ITS ASSERTION THAT A SUBSTANTIAL PORTION OF
15 THE \$325 MILLION IN W-2 COMPENSATION HAS, IN FACT,
16 ALREADY BEEN PAID TO MR. KOZLOWSKI AND SHOULD BE
17 RECOVERABLE BY TYCO UNDER ONE OF ITS EQUITABLE
18 THEORIES FOR RELIEF.

19 MY CONCERN HERE IS THAT IF I SIMPLY DON'T ACT
20 FOR A WEEK OR SO TO GIVE THE PARTIES A CHANCE TO BRIEF
21 THE ISSUES THAT THE ISSUE WILL BECOME MOOT BECAUSE ANY
22 MONIES THAT MAY BE SUBJECT TO THAT INJUNCTION WILL BE
23 SWIFTLY TRANSFERRED AND THE WHOLE MATTER WILL BE MOOT.

24 MR. SCHWARTZ, I WANT TO GIVE YOU A CHANCE TO
25 BRIEF THESE ISSUES, BUT I DON'T WANT -- BY GIVING YOU

1 A CHANCE TO BRIEF THESE ISSUES -- TO MAKE THE WHOLE
2 MATTER MOOT WHILE YOUR CLIENT SIMPLY GOES AHEAD AND
3 SWIFTLY TRANSFERS ALL OF THE ASSETS OUT AND THEN TELLS
4 ME, SORRY, JUDGE, TOO LATE. IT'S DONE.

5 MR. SCHWARTZ: YOUR HONOR, LET ME RENEW THE
6 SUGGESTION I MADE EARLIER IN THIS CALL. THAT I THINK
7 I CAN, IF YOUR HONOR WILL ENTERTAIN IT, EXPLAIN
8 EX PARTE TO YOUR HONOR WHY IT'S NOT GOING TO BE
9 RENDERED MOOT IN THE PERIOD OF TIME THAT YOUR HONOR IS
10 TALKING ABOUT OR ANY SUBSTANTIAL PERIOD OF TIME BEYOND
11 THAT.

12 I'M SIMPLY NOT AT LIBERTY -- BECAUSE OF THE
13 CONFIDENTIALITY ORDER THAT I UNDERSTAND IS PART OF THE
14 FLORIDA JUDGMENT -- TO SIMPLY DISCLOSE THE FACTS TO
15 ALL THE PARTIES ON THIS CALL, BUT I THINK I CAN GIVE
16 YOUR HONOR ASSURANCE THAT WITHOUT ANY RESTRAINT FROM
17 YOUR HONOR THE CONCERN THAT YOU HAVE WILL NOT BE
18 RENDERED MOOT.

19 I DID MENTION THAT I THINK THERE IS AN EFFORT
20 UNDERWAY TO PAY BACK PROPERTY TAXES IN FLORIDA ON
21 FLORIDA PROPERTY, BUT THAT IS, MY UNDERSTANDING, THE
22 ONLY THING THAT IS LIKELY TO HAPPEN IN THE NEAR TERM,
23 AND I CAN ELABORATE ON THAT TO THE POINT THAT I THINK
24 YOUR HONOR WILL BE SATISFIED IF YOUR HONOR WILL
25 ENTERTAIN THAT.

1 THE COURT: THE PROBLEM WITH TRUST ME ON AN
2 EX PARTE BASIS, JUDGE -- YOU KNOW, I DON'T DOUBT YOUR
3 CREDIBILITY, BUT WHAT YOU SAY TO ME DEPENDS UPON WHAT
4 YOUR CLIENT DOES AND OTHER PEOPLE AND --

5 MR. SCHWARTZ: I DON'T THINK IT DOES IN THESE
6 CIRCUMSTANCES, YOUR HONOR, AND AGAIN, I CAN EXPLAIN
7 THAT SO THAT YOUR HONOR CAN ASSESS THAT FOR YOURSELF.

8 THE COURT: I'M REALLY NOT WILLING TO TAKE
9 SOMETHING LIKE THAT ON AN EX PARTE BASIS. IT REALLY
10 IS -- I'M NOT COMFORTABLE IN MAKING A DECISION TO ACT
11 OR NOT ACT ON THE BASIS OF THAT KIND OF INFORMATION.

12 MR. SCHWARTZ: I UNDERSTAND, YOUR HONOR.
13 EXCEPT FOR THE ORDER OF THE FLORIDA COURT, WHICH I'VE
14 BEEN ADVISED OF BY MR. KOZLOWSKI'S DIVORCE COUNSEL, I
15 HAVE NO PROBLEMS SHARING THE FACTS WITH YOUR HONOR AND
16 TYCO'S COUNSEL.

17 PERHAPS AN APPLICATION CAN BE MADE WITH
18 NOTICE TO MRS. KOZLOWSKI AND THE COURT IN FLORIDA THAT
19 WILL PERMIT THAT INFORMATION TO BE SHARED
20 UNDER WHATEVER RESTRAINTS THE FLORIDA COURT DEEMS
21 APPROPRIATE, BUT I DON'T THINK I CAN SIMPLY LAY OUT
22 THE SUBSTANTIVE TERMS OF THAT DIVORCE DECREE WITHOUT
23 VIOLATING THAT FLORIDA COURT ORDER.

24 THE COURT: ALL RIGHT. WELL, HERE'S WHAT I'M
25 GOING TO DO -- AND I THINK, MR. SCHWARTZ, YOU'VE LAID

1 OUT A CREDIBLE ARGUMENT AND I NEED TO HAVE A BETTER
2 UNDERSTANDING OF IT, BUT I'M IN A SITUATION WHERE I
3 HAVE TO ACT, AND BASED ON WHAT I KNOW SO FAR, I DO
4 BELIEVE THAT TYCO HAS SATISFIED THE REQUIREMENTS FOR A
5 TEMPORARY RESTRAINING ORDER, BUT HERE'S WHAT I'M GOING
6 TO DO BECAUSE I WANT TO GIVE YOU A CHANCE TO BRIEF
7 THIS ISSUE -- THESE ISSUES A LITTLE MORE FULLY AND
8 GIVE ME AN OPPORTUNITY TO CONSIDER YOUR ARGUMENTS,
9 WHICH ARE NOT FRIVOLOUS BY ANY MEANS, AND SO I'M GOING
10 TO ISSUE AN ORDER, BUT I'M GOING TO LEAVE IT IN PLACE
11 ONLY FOR SEVEN DAYS, AND I'M GOING TO DIRECT FIRST
12 TYCO BY 5:00 P.M. ON WEDNESDAY TO FILE A SUPPLEMENTAL
13 MEMORANDUM WITH SUPPORTING AFFIDAVITS AND EXHIBITS
14 THAT SUPPORTS ITS CONTENTION THAT A SUBSTANTIAL
15 PORTION OF THE \$325 MILLION IN CLAIMED W-2
16 COMPENSATION WAS, IN FACT, PAID TO MR. KOZLOWSKI, AND
17 THAT MR. KOZLOWSKI'S CLAIM THAT THE MAJORITY OF THAT
18 OR ALL OF IT OR A SIGNIFICANT PART OF IT IS, IN FACT,
19 DEFERRED COMPENSATION IS NOT TRUE SO YOU'LL PROVIDE ME
20 WITH THE SUPPORTING INFORMATION BY 5:00 O'CLOCK ON
21 WEDNESDAY.

22 MR. SCHWARTZ, YOU FILE A SUPPLEMENTAL
23 MEMORANDUM BY 5:00 P.M. ON FRIDAY, AND I WILL CONSIDER
24 IT OVER THE WEEKEND AND DECIDE WHETHER TO LEAVE THE
25 TEMPORARY RESTRAINING ORDER IN PLACE UNTIL I CAN SET

1 UP A PRELIMINARY INJUNCTION HEARING.

2 I OBVIOUSLY DO NOT WANT TO LEAVE AN ORDER --
3 A TEMPORARY ORDER IN PLACE IF IT TURNS OUT THAT I
4 DON'T HAVE THE AUTHORITY TO ISSUE SUCH AN ORDER, BUT
5 BASED ON WHAT'S BEEN PRESENTED TO ME SO FAR UNDER THE
6 TIME CONSTRAINTS UNDER WHICH I'M OPERATING AND THE
7 FACT THAT MR. SCHWARTZ HAS NOT HAD AN OPPORTUNITY TO
8 SUBMIT A BRIEF ON THE SUBJECT, I BELIEVE THAT I DO
9 HAVE THE AUTHORITY TO ISSUE A RESTRAINING ORDER
10 HERE AT LEAST IN THE AMOUNT OF \$325 MILLION AND SO I'M
11 GOING TO ISSUE IT IN THAT AMOUNT AND LEAVE IT IN PLACE
12 UNDER THESE TERMS.

13 I'LL HEAR FIRST FROM TYCO AND THEN FROM MR.
14 SCHWARTZ. THAT'S WHAT I'M PROPOSING TO DO. ANY
15 COMMENTS THAT YOU WANT TO MAKE? ANYBODY FROM TYCO
16 WANT TO SAY ANYTHING?

17 MR. BEIL: WE'RE PREPARED TO LIVE WITH THAT,
18 YOUR HONOR. WE'VE ALSO ASKED FOR SOME EXPEDITED
19 DISCOVERY.

20 THE COURT: I'M GOING TO WITHHOLD THAT UNTIL
21 AFTER I GET THE BRIEFING ON THIS ISSUE, AND WE ALSO
22 NEED TO TALK ON THE QUESTION OF BOND BEFORE I LET YOU
23 GO, BUT I DON'T WANT TO ORDER ANY EXPEDITED DISCOVERY
24 NOW. IF I LEAVE THE RESTRAINING ORDER IN PLACE
25 PENDING A PRELIMINARY INJUNCTION HEARING, I WOULD

1 LIKELY ORDER THE EXPEDITED DISCOVERY.

2 MR. BEIL: THAT'S FINE, YOUR HONOR.

3 MR. SCHWARTZ: YOUR HONOR, WITH REGARDS TO
4 THE PROPOSED BRIEFING SCHEDULE, THE PERSONAL PROBLEM
5 THAT I HAVE IS THE JEWISH HOLIDAY BEGINS AT SUNDOWN ON
6 WEDNESDAY. THAT ESSENTIALLY WILL HAVE ME OUT OF
7 POCKET FROM A LITTLE EARLIER WEDNESDAY AFTERNOON TILL
8 PROBABLY SOMETIME THURSDAY NIGHT.

9 THE COURT: I RESPECT THAT, AND I'M WILLING
10 TO GIVE YOU MORE TIME, BUT THE INJUNCTION THEN WOULD
11 REMAIN IN PLACE FOR A LITTLE BIT LONGER. IF YOU WOULD
12 PREFER THAT, I'LL GIVE YOU AN EXTRA WEEK IF YOU WANT
13 JUST SO YOU CAN REALLY TRY TO NAIL DOWN YOUR BRIEFING,
14 BUT YOU SEE MY PROBLEM. IF I DON'T DO ANYTHING
15 PENDING THE BRIEFING THEN -- I KNOW YOU'LL TRY TO DO
16 THE RIGHT THING, BUT YOU CAN'T CONTROL WHAT YOUR
17 CLIENT AND OTHERS DO, AND I'VE HAD SITUATIONS LIKE
18 THIS WHERE THE MINUTE PEOPLE KNOW THERE'S GOING TO BE
19 AN ORDER, THEY START TRANSFERRING ASSETS, AND I DON'T
20 WANT THAT TO HAPPEN.

21 I'M CERTAINLY WILLING TO GIVE YOU ANOTHER
22 WEEK IF YOU WOULD LIKE THAT, BUT THE ORDER WOULD THEN
23 REMAIN IN PLACE FOR THAT ADDITIONAL WEEK.

24 MR. SCHWARTZ: IF I CAN LEAVE IT THIS WAY,
25 YOUR HONOR, WE WILL DO OUR BEST TO GET THE BRIEF TO

1 YOUR HONOR AS YOU'VE ASKED FOR 5:00 P.M. ON FRIDAY,
2 BUT IF WE'RE UNABLE TO DO THAT, I UNDERSTAND YOUR
3 HONOR IS GIVING US LEAVE TO TAKE ADDITIONAL TIME WITH
4 THE CONSEQUENCE THAT THE TRO WOULD EXTEND?

5 THE COURT: YEAH. I'M FINE WITH THAT. IF
6 YOU CAN GET YOUR BEST WORK IN BY FRIDAY AT 5:00 AND
7 YOU WANT IT TO STAND, THEN I'LL TAKE IT, AND IF YOU
8 DON'T GET IT IN BY FRIDAY AT 5:00, I'M GOING LEAVE THE
9 INJUNCTION IN PLACE UNTIL I'VE HAD SUCH TIME TO
10 CONSIDER ANY BRIEFING THAT YOU DO FILE. DO YOU
11 UNDERSTAND WHAT I'M SAYING?

12 MR. SCHWARTZ: I THINK I DO, YOUR HONOR, AND
13 WITH REGARDS TO --

14 THE COURT: WHAT ABOUT BOND? IT'S HARD FOR
15 ME TO FIGURE OUT WHAT THE NEED FOR A BOND IS IN THIS
16 CASE, BUT IF YOU WANTED TO MAKE AN ARGUMENT ON IT,
17 I'LL HEAR YOU ON IT.

18 MR. SCHWARTZ: WELL, EVEN DURING THE TIME
19 THAT MR. KOZLOWSKI WAS LIVING UNDER THE NEW YORK CIVIL
20 FORFEITURE FREEZE ORDER, NUMEROUS EXPENSES, INCLUDING
21 PAYMENTS TO HIS THEN WIFE, WERE AUTHORIZED AND MADE,
22 AND THERE ARE NO DOUBT ONGOING EXPENSES THAT MR.
23 KOZLOWSKI HAS TO MAINTAIN PROPERTIES THAT HE OWNS, TO
24 MEET CONTRACTUAL OBLIGATIONS AND PAY OTHER PEOPLE WHO
25 ARE PROVIDING SERVICES FOR HIM, AND I ALSO MENTIONED

1 EARLIER THAT I ANTICIPATE THAT A BACK PROPERTY TAX
2 WAS -- THE PARTIES IN FLORIDA WERE IN THE PROCESS OF
3 TRYING TO MAKE THAT PAYMENT. OBVIOUSLY AS THOSE
4 PAYMENTS ARE DELAYED, THERE ARE COST CONSEQUENCES.
5 THERE MAY BE PENALTIES. I DON'T REALLY KNOW.

6 THE COURT: DOESN'T THE PROPOSED ORDER --
7 EXCEPT PAYMENTS TO MRS. KOZLOWSKI ON OR HER BEHALF --
8 AUTHORIZE THOSE KIND OF ROUTINE PAYMENTS? LET ME ASK
9 TYCO'S COUNSEL. YOU SUBMITTED A PROPOSED ORDER.
10 DIDN'T YOU CONTEMPLATE THAT THERE WOULD BE
11 DISBURSEMENTS ALLOWED FOR THOSE KINDS OF ROUTINE
12 MATTERS?

13 MR. BEIL: YES, YOUR HONOR. WE VERY MUCH
14 DID. WE'RE FAMILIAR WITH HOW THE SITUATION WORKED IN
15 NEW YORK, AND WE'RE NOT CONCERNED ABOUT THE PAYMENT OF
16 BILLS IN THE ORDINARY COURSE, AND SO THAT THE ORDER
17 PROVIDES -- ALLOWS FOR THAT TO HAPPEN -- THE PROPOSED
18 ORDER.

19 MR. SCHWARTZ: DO I UNDERSTAND THEN THAT THE
20 ORDER SIMPLY RESTRAINS MR. KOZLOWSKI FROM
21 TRANSFERRING --

22 THE COURT: WELL, LET ME GET IT. I'LL READ
23 THE LANGUAGE THAT TYCO WAS PROPOSING, AND WE CAN TALK
24 ABOUT WHETHER IT'S SENSIBLE OR NOT. I CERTAINLY DON'T
25 WANT A ROUTINE PAYMENT TO BE STOPPED UNNECESSARILY

1 HERE.

2 HERE'S WHAT TYCO SAYS IN PERTINENT PART:

3 "PENDING THE DETERMINATION OF THE BRANCH OF THE MOTION
4 SEEKING A PRELIMINARY INJUNCTION, DEFENDANT L. DENNIS
5 KOZLOWSKI, HIS AGENT, SERVANTS, EMPLOYEES AND
6 ATTORNEYS, ALL PERSONS IN ACTIVE CONCERT OR
7 PARTICIPATION WITH SAID DEFENDANT, AND ALL OTHER
8 PERSONS WHO RECEIVE ACTUAL NOTICE OF THIS ORDER BY
9 PERSONAL SERVICE OR OTHERWISE, SHALL NOT TRANSFER,
10 ASSIGN, ENCUMBER, SELL OR DISPOSE OF ANY ASSETS OR
11 PROPERTY, REAL OR PERSONAL, TANGIBLE OR INTANGIBLE IN
12 WHICH SAID COURT HAS A LEGAL, EQUITABLE, CUSTODIAL OR
13 BENEFICIAL INTEREST, EXCEPT AS MAY BE REQUIRED TO PAY
14 BILLS OR EXPENSES OF SAID DEFENDANT IN THE ORDINARY
15 COURSE (OTHER THAN ANY PAYMENTS IN CONNECTION WITH ANY
16 AGREEMENT WITH OR DIVORCE JUDGMENT GRANTED TO KAREN
17 KOZLOWSKI)."

18 SO I THINK THEY CREATED AN EXCEPTION AND AN
19 EXCEPTION TO THE EXCEPTION, AND IT SEEMS LIKE, MR.
20 SCHWARTZ, IT WOULD ADDRESS YOUR PRINCIPAL CONCERNS.

21 MR. SCHWARTZ: WELL, YOUR HONOR, I DON'T KNOW
22 HOW THE EXCEPTION TO THE EXCEPTION APPLIES BECAUSE THE
23 FUNDS, AS I UNDERSTAND IT, THAT WOULD BE USED TO PAY
24 THIS PROPERTY TAX BILL WERE ONLY BEING RELEASED AND
25 MADE AVAILABLE FOR THAT PURPOSE AS A RESULT OF THE

1 DIVORCE JUDGMENT.

2 THE COURT: WHY DON'T -- AFTER THIS CALL IS
3 OVER -- YOU CONSULT WITH TYCO'S COUNSEL AND, IF
4 NECESSARY, MRS. KOZLOWSKI'S COUNSEL AND DRAFT PROPOSED
5 LANGUAGE. IF YOU'VE GOT CERTAIN BILLS THAT YOU KNOW
6 NEED TO BE PAID WITHIN THE NEXT TEN DAYS OR SO AND YOU
7 CAN GET AGREEMENT, WE'LL BUILD THEM RIGHT INTO THE
8 ORDER SO THAT IT'S CLEAR THAT SHE CAN HAVE THOSE
9 MONIES USED FOR HER BENEFIT OR TO PAY THOSE BILLS.

10 MR. SCHWARTZ: I WILL TRY TO DO THAT, YOUR
11 HONOR. THERE'S ANOTHER LAW FIRM THAT ADVISES MR.
12 KOZLOWSKI AND IS FAMILIAR WITH ALL OF THAT. WE'RE
13 NOT.

14 AM I LEAST CORRECT IN UNDERSTANDING THAT
15 PAYING BACK PROPERTY TAX IS CONSISTENT WITH THE ORDER
16 YOUR HONOR IS CONTEMPLATING ENTERING?

17 THE COURT: HOW DOES TYCO FEEL ABOUT THAT?

18 MR. BEIL: I'M NOT SURE, YOUR HONOR. WHAT'S
19 THE MAGNITUDE OF THE PAYMENTS THAT ARE BEING MADE? DO
20 WE KNOW?

21 MR. SCHWARTZ: I BELIEVE -- AND I DON'T HAVE
22 THE EXACT AMOUNT, BUT I BELIEVE IT'S IN THE ORDER OF
23 ABOUT A HALF A MILLION DOLLARS OF BACK PROPERTY TAXES.
24 THERE MAY BE SOME INTEREST AND PENALTY ON THAT. I
25 DON'T KNOW.

1 THE COURT: THIS IS ON FLORIDA PROPERTY?

2 MR. SCHWARTZ: YES, YOUR HONOR.

3 THE COURT: THAT'S SUBJECT TO A HOMESTEAD?

4 MR. SCHWARTZ: YES, YOUR HONOR.

5 THE COURT: IT SOUNDS LIKE THAT KIND OF
6 PAYMENT WOULD BE ONE THAT WOULD BE ORDINARILY
7 CONTEMPLATED, BUT IF TYCO HAS SOME REASON WHY IT
8 SHOULDN'T BE PAID, I WOULD CERTAINLY BE HAPPY TO HEAR
9 IT.

10 MR. BEIL: I'M PREPARED TO DISCUSS THIS WITH
11 MR. SCHWARTZ OR FLORIDA COUNSEL OFF-LINE, BUT I'M SURE
12 AN ACCOMODATION CAN BE REACHED HERE ON THAT, YOUR
13 HONOR.

14 THE COURT: ALL RIGHT. WHY DON'T YOU TALK
15 ABOUT IT AND SOMETIME BEFORE THE END OF THE DAY GET
16 BACK TO MY DOCKETING CLERK WITH SOME PROPOSED
17 LANGUAGE, AND I'LL GIVE IT SERIOUS CONSIDERATION,
18 ESPECIALLY IF YOU CAN AGREE TO IT, WHEN ENTERING THE
19 RESTRAINING ORDER.

20 I'VE ALSO BEEN ADVISED THAT MONDAY IS A
21 FEDERAL HOLIDAY SO REALISTICALLY, MR. SCHWARTZ, TO
22 REGARDING YOUR CONCERN, WHY DON'T I GIVE YOU UNTIL
23 5:00 P.M. NEXT TUESDAY TO FILE YOUR BRIEF. THAT WILL
24 GIVE YOU ONE BUSINESS DAY AFTER THE HOLIDAY AND SOME
25 TIME ON THE WEEKEND TO WORK ON IT.

1 MR. SCHWARTZ: THAT'S FINE, YOUR HONOR.

2 THE COURT: AND THEN I WILL LEAVE THE ORDER
3 IN PLACE UNTIL 5:00 P.M. ON FRIDAY OF THAT FOLLOWING
4 WEEK UNLESS AND UNTIL IT'S EXTENDED OR OTHERWISE
5 MODIFIED BY ORDER OF THE COURT SO WHAT WE'RE PROPOSING
6 TO DO IS LEAVE IT IN PLACE UNTIL A WEEK FROM FRIDAY
7 UNLESS -- IF I CAN GET TO THE POINT WHERE --

8 MR. SCHWARTZ, IF YOUR BRIEF PERSUADES ME, I'LL JUST
9 DISSOLVE THE ORDER RIGHT AWAY AND ISSUE AN EXPLANATION
10 AS SOON AS I CAN.

11 IF YOUR BRIEF DOESN'T PERSUADE ME, IT WILL
12 STAY IN PLACE UNTIL 5:00 A WEEK FROM FRIDAY, AND THEN
13 I'LL ISSUE A FURTHER ORDER EXTENDING IT UNTIL THE
14 PRELIMINARY INJUNCTION HEARING.

15 I STILL WOULD LIKE BY THE END OF THE DAY ON
16 WEDNESDAY TYCO'S FACTUAL SUPPORT FOR ITS ASSERTION
17 THAT SOME SIGNIFICANT PORTION OF THE \$325 MILLION IS,
18 IN FACT, MONEY THAT WAS PAID AND IF -- WELL, IF TYCO
19 HAS A RESPONSE -- A BRIEF REPLY TO MR. SCHWARTZ'S
20 BRIEF, IT SHOULD BE -- HE'S GOING TO FILE HIS AT 2:00
21 P.M. ON -- EXCUSE ME -- 5:00 P.M. ON TUESDAY. LET'S
22 HAVE TYCO'S BY 5:00 P.M. ON THURSDAY IF THERE'S ANY
23 KIND OF A REPLY. I CAN JUST LOOK IT OVER.

24 MR. BEIL: THAT'S FINE, YOUR HONOR.

25 THE COURT: ALL RIGHT. UNFORTUNATELY ALMOST

1 EVERYTHING IN TYCO IS VERY DIFFICULT TO DEAL WITH, AND
2 SO I'M SORRY THAT I CAN'T GIVE YOU A MORE DEFINITIVE
3 ANSWER TO THE PROBLEM, BUT MR. SCHWARTZ DOES RAISE
4 SOME INTERESTING ISSUES THAT I WANT A CHANCE TO THINK
5 ABOUT BEFORE I LEAVE THIS ORDER IN PLACE.

6 I'M NOT PROPOSING TO SET A BOND BECAUSE FOR
7 THE VERY BRIEF TIME THAT THIS ORDER WOULD BE IN PLACE
8 IT DOESN'T SEEM TO ME THAT THERE'S ANY SIGNIFICANT
9 RISK TO MR. KOZLOWSKI THAT TYCO COULDN'T SATISFY
10 PURSUANT TO ANY ORDER OR JUDGMENT THAT'S ENTERED GIVEN
11 ITS FINANCIAL SITUATION, WHICH APPEARS TO BE MORE THAN
12 ADEQUATE TO ALLOW IT TO PAY ANY JUDGMENT OR TO SATISFY
13 ANY ORDER THAT THE COURT ISSUES IN THE EVENT THAT THE
14 COURT DETERMINES THAT THE RESTRAINING ORDER WAS NOT
15 PROPERLY ISSUED.

16 DOES ANYBODY WANT TO SAY ANYTHING MORE ABOUT
17 THE BOND ISSUE? I DON'T HEAR ANYBODY.

18 MR. SCHWARTZ: YOUR HONOR, I WILL JUST SPEAK
19 TO THAT IN OUR PAPERS.

20 THE COURT: SURE. IF I'M GOING TO EXTEND IT
21 AND YOU WANT TO MAKE AN ARGUMENT FOR BONDING, TELL ME
22 WHAT THE ARGUMENT IS AND WHAT THE BOND SHOULD BE, AND
23 IF I EXTEND IT AND YOU PERSUADE ME THAT THERE'S A
24 REQUIREMENT FOR SOME BOND, I'LL ORDER IT TO BE POSTED.
25 I'M SURE TYCO CAN SATISFY ANY REASONABLE BOND

1 REQUIREMENT THAT IS IMPOSED. IT JUST COSTS MONEY TO
2 BUY A BOND. YOU CAN INCLUDE THAT IN YOUR BRIEFING IF
3 YOU WANT.

4 IF WE SET A -- AS I SAID, I'M INCLINED TO
5 GRANT SOME EXPEDITED DISCOVERY IF I ALLOW THE ORDER TO
6 REMAIN IN PLACE BEYOND FRIDAY. THAT DISCOVERY SHOULD
7 BE LIMITED AND FOCUSED ALONG THE LINES THAT TYCO HAS
8 PROPOSED. IF I ALLOW IT, WHEN WOULD THE PARTIES WANT
9 TO HAVE A PRELIMINARY INJUNCTION HEARING? HOW SOON
10 WOULD YOU WANT IT? DO YOU KNOW NOW, OR WOULD YOU
11 RATHER WAIT AND CONFER AFTER I MAKE A DECISION ABOUT
12 LEAVING THE TEMPORARY RESTRAINING ORDER IN PLACE AND
13 THEN MAYBE PROPOSE A DATE TO ME?

14 MR. SCHWARTZ: I THINK THAT MAKES MORE SENSE,
15 YOUR HONOR, THAN TRYING TO FIGURE OUT A DATE NOW SINCE
16 WE WON'T KNOW YOUR HONOR'S DECISION UNTIL PERHAPS A
17 WEEK FROM FRIDAY.

18 THE COURT: IS THAT OKAY WITH TYCO?

19 MR. BEIL: YES, SIR.

20 THE COURT: ALL RIGHT. WHAT WE'LL DO THEN IS
21 AFTER GETTING BRIEFING I'LL DECIDE WHETHER THE ORDER
22 SHOULD REMAIN IN PLACE BEYOND A WEEK FROM FRIDAY.
23 I'LL RULE ON THE ISSUE OF WHETHER A BOND IS REQUIRED,
24 AND IF I LEAVE THE ORDER IN PLACE, I'LL PROBABLY ORDER
25 THE EXPEDITED DISCOVERY AND DIRECT THE PARTIES TO MEET

1 AND CONFER AND PROPOSE A DATE FOR A PRELIMINARY
2 INJUNCTION HEARING.

3 ALL RIGHT. IS THERE ANYTHING ELSE THAT
4 PEOPLE NEED TO TAKE UP WITH ME TODAY?

5 MR. BEIL: NO, YOUR HONOR.

6 MR. SCHWARTZ: NO, YOUR HONOR.

7 THE COURT: ALL RIGHT. THANK YOU, AND I DO
8 APPRECIATE YOUR COMING TO THE TABLE WITH SOME
9 INTERESTING ARGUMENTS. IT HAS GIVEN ME SOMETHING TO
10 THINK ABOUT, AND I'LL CAREFULLY CONSIDER THEM BEFORE I
11 DECIDE WHETHER TO LEAVE THE ORDER IN PLACE.

12 I WILL WAIT TO HEAR FROM YOU REGARDING THAT
13 LANGUAGE THAT YOU HAD ASKED ME TO SUBMIT. IF I DON'T
14 HEAR FROM YOU BY THE END OF THE DAY, I'LL ISSUE THE
15 ORDER PRETTY MUCH AS IT'S BEEN PROPOSED BY TYCO, BUT I
16 WANT TYCO TO MAKE A GOOD FAITH EFFORT TO TRY TO REACH
17 SOME AGREEMENT ON SPECIFIC LANGUAGE HERE.

18 IF THERE IS A PROPERTY TAX PAYMENT OR
19 SOMETHING ELSE THAT'S GOING TO OCCUR IN THE NEXT TEN
20 DAYS THAT ISN'T REALLY IN THE NATURE OF A FRAUDULENT
21 TRANSFER BUT REALLY IS DESIGNED TO PAY SOME KIND OF
22 BILL LIKE A PROPERTY TAX BILL, I WOULD EXPECT TYCO
23 WOULD BE REASONABLE ABOUT TRYING TO AGREE ON LANGUAGE
24 TO ALLOW THAT TO OCCUR.

25 MR. BEIL: WE WILL, YOUR HONOR.

1 THE COURT: OKAY. ALL RIGHT. THANK YOU.
2 I'LL WAIT FOR YOUR LANGUAGE ON THAT, AND I'LL GET THAT
3 ORDER OUT AT THE END OF TODAY. THANK YOU.

4 MS. EDWARDS: THANK YOU.

5 MR. SCHWARTZ: THANK YOU.

6 (CONCLUSION OF HEARING AT 11:45 A.M.)

7

8

9 C E R T I F I C A T E

10

11 I, SUSAN M. BATEMAN, DO HEREBY CERTIFY
12 THAT THE FOREGOING TRANSCRIPT IS A TRUE AND ACCURATE
13 TRANSCRIPTION OF THE WITHIN PROCEEDINGS, TO THE BEST
14 OF MY KNOWLEDGE, SKILL, ABILITY AND BELIEF.

15

16 SUBMITTED: 10-8-08 /S/ SUSAN M. BATEMAN
SUSAN M. BATEMAN, CSR, RPR, CRR

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